UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HEARTHSIDE FOOD SOLUTIONS, LLC

and

BAKERY, CONFECTIONARY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 280, AFL-CIO-CLC

Cases: 9-CA-46342
9-CA-60058
9-CA-60071
9-CA-60361
9-RC-18351

Eric V. Oliver, Esq., and *Linda B. Finch, Esq.,*
for the Acting General Counsel.[1]
Robert W. Stewart, Esq., and *John P. Hasman, Esq.,*
of St. Louis, Missouri, for the Respondent/Employer.
Dennis Howard, Sr., of Evansville, Indiana, for the
Charging Party/Petitioner.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Somerset, Kentucky, on November 1 through 4, 2011, and in London, Kentucky, on November 7, 2011.[2] As to the unfair labor practice portion of this consolidated proceeding, the initial charge was filed March 30, a second charge was filed April 29,[3] followed by a third charge filed May 3, and a fourth on June 16. The Regional Director issued the original order consolidating cases, consolidated complaint, and notice of hearing on August 31. An amended consolidated complaint followed on October 6.

These unfair labor practice issues are consolidated with a representation issue. On March 25, Petitioner filed a petition for a representation election among a unit of the Employer's workers. On May 5, the Regional Director issued a decision and direction of election. The election was held on June 2 and 3. On June 8, Petitioner filed objections to the Employer's conduct affecting that election. The Regional Director issued a report on objections, order directing hearing, order consolidating cases, and order transferring case to the Board on

[1] For simplicity, I will refer to the Acting General Counsel as the General Counsel throughout the remainder of this decision.

[2] All dates are in 2011 unless otherwise indicated.

[3] This charge was amended on September 19 and October 4.

October 11. This was amended on October 13.

In the unfair labor practice case, the General Counsel's amended consolidated complaint alleges that the Employer unlawfully interrogated an employee, threatened an employee, solicited and encouraged employees to circulate an antiunion petition, and repeatedly made implied promises to correct employees' grievances. These acts are alleged to have violated Section 8(a)(1) of the Act. In addition, the complaint alleges that the Employer subjected three of its employees, Audia Collins, Roderic Collins, and Peggy Jackson, to unlawful discrimination by discharging them from its employ in violation of Section 8(a)(3) and (1). The Employer filed an answer to the amended consolidated complaint denying all of the material allegations.[4]

As to the representation matter, the Petitioner originally filed 11 objections to the Employer's conduct during the critical period preceding the election. As stated in the Regional Director's report on the objections, the Petitioner subsequently withdrew Objections 2, 3, 4, 5, 7, 8, 10, and 11. (GC Exh. 1(r), at fn. 2.) However, in his amended report, the Regional Director noted that other conduct alleged in the amended consolidated complaint to constitute unfair labor practices, if substantiated, could provide additional grounds for setting aside the results of the election. Specifically, the alleged additional misconduct consisted of three implied promises to correct employees' grievances. (GC Exh. 1(t), p. 3.) As a result, I will evaluate the merits of Objections 1, 6, and 9, plus the additional conduct referenced by the Regional Director. As a practical matter, I note that all of the conduct alleged to be objectionable is also alleged to constitute unfair labor practices. As previously indicated, the Employer has denied all of these allegations.

For reasons that will be discussed in detail in the remainder of this decision, I have concluded that the General Counsel has failed to meet his burden of proving that the Employer engaged in the conduct alleged to constitute unfair labor practices. It follows that the Petitioner has also failed to demonstrate that the Employer engaged in objectionable conduct that could have affected the election results. In light of these conclusions, I will recommend that the amended consolidated complaint be dismissed, that the objections be overruled, and the results of the election be certified.

On the entire record,[5] including my observation of the demeanor of the witnesses, and

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[4] In its answer, the Employer also raised a procedural defense contending that the General Counsel was acting in an improper fashion as he had elected to file this complaint while other pending charges remained unresolved, thereby subjecting the Employer to "unwarranted and impermissible piecemeal litigation," in violation of the Board's standards expressed in *Jefferson Chemical,* 200 NLRB 992 (1972). (GC Exh. 1(v), p. 3.) At the outset of the trial, I raised this matter with the parties, noting that I had considered this defense and concluded that it was premature. Any appropriate relief should be addressed in the event that the General Counsel proceeds to complaint as to those unresolved pending charges. (Tr. 14-16.)

[5] It is necessary to mention several issues related to the state of the record. While the transcript is generally accurate, a few corrections are necessary. At Tr. 642, l. 7, "horrible" should be "portable;" at Tr. 809, l. 2, "impasse" should be "impact;" and at Tr. 1072, l. 2, the phrase "your representation is evidence" should be "your representation is not evidence." Finally, at Tr. 676, ll. 2-3, the testimony is garbled and I do not recall its actual content. All other errors of transcription are not significant or material. As to the documentary evidence, R. Exh. 38, p. 29 was mistakenly included in the exhibit file. This page was not admitted into the record and has not been considered in evaluating the evidence. See, Tr. 1073—1074. Lastly, I have

Continued

after considering the briefs filed by the General Counsel and the Employer, I make the following

Findings of Fact

I. Jurisdiction

The Employer, a limited liability corporation, manufactures cookies, crackers, and other baked goods at its facility in London, Kentucky, where it annually sells and ships from its London, Kentucky, facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky. The Employer admits[6] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Facts

All of the controversies in this case arose in the context of the Union's organizing campaign at the Employer's London plant. On May 10, 2010, the Employer acquired that facility through an asset purchase from the Consolidated Biscuit Company. The factory occupies a large building comprising approximately 265,000 square feet. It employs approximately 700 people who prepare the Company's products. Those products are marketed under the brands of other companies and include such well-known foods as Oreo cookies and granola bars.

Prior to the events about to be recounted, the workforce was not represented by any labor organization. In January, an employee telephoned Dennis Howard, Sr., business agent for the Union, in order to seek his assistance in obtaining representation. Howard began an organizing campaign, conducting an initial union meeting at a local Hampton Inn on February 3. Approximately 15 to 18 employees attended.

Among those attending this meeting was Roderic Collins, a machine operator who has been employed by the Company since January 2009.[7] He signed an authorization card and became active in the campaign. Among his union activities were the solicitation of signatures on authorization cards, handbilling, and talking to fellow employees about the Union.

At an early stage, the Union's effort became known to the Employer. This was manifested through a letter written on the same date as the initial union meeting. It was authored by Doug Sherman, the Employer's vice president for manufacturing, and was addressed to the workforce. Sherman advised that he was "committed to keeping outsiders like this union from . . . interfering with your job, your job security, our customers and our culture." (GC Exh. 3.) He concluded the letter by suggesting to the employees that they treat the Union's

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taken the liberty of redacting social security numbers that appeared at GC Exh. 9, pp. 1, 2, 9, and 21; R. Exh. 6, pp. 1, 8, and 9; and R. Exh. 24, p. 6. To the extent that other copies of the exhibit files are extant as public records, I direct the Board's staff to make the same redactions.

[6] In its answer to the consolidated amended complaint, the Employer admitted the jurisdictional allegations. See GC Exh. 1(v), pars. 2 and 3.

[7] Roderic Collins' brother, Audia Collins, was also employed by the Company. He was hired in 1999 and had been a line mechanic for approximately 4 to 5 years. Both brothers figure prominently in this case as alleged discriminatees. For ease of reference and clarity, I will refer to them by their first names. No disrespect is intended.

authorization cards like "junk mail." (GC Exh. 3.)

As the Union's effort progressed, two other employees with significance to this case signed authorization cards. On February 26, Peggy Jackson, a machine operator hired in 1998, signed her card. On March 2, Audia signed his card, joining his brother in the organizing drive.

At this juncture, it is necessary to interrupt the chronological discussion of the Union's campaign to describe a different set of events related to the Collins brothers. On March 14, a relative of theirs, Jimmy Napier, passed away. Shortly thereafter, each of the brothers informed his respective supervisor that they had a death in the family and would be requesting funeral leave once the arrangements had been finalized.

This Employer has a detailed and well-defined funeral leave policy. It is contained in the employee handbook. The description of this policy begins with the Employer's statement of recognition that "it is a difficult time when a member of one's immediate family passes away." (GC Exh. 6, p. 23.) In order to "help you through this period," the Company offers a funeral leave benefit that varies based on the degree of relationship between the employee or his or her spouse and the decedent. For persons in the closest degree of relationship, the benefit consists of 3 days of paid leave.[8] For those in a lesser degree of familial proximity, the benefit provides for 2 days of paid leave. Specifically, that level of benefit is provided for the loss "of the employee or spouse's niece, nephew, aunt or uncle." (GC Exh. 6, p. 24.) Finally, the policy permits an employee to apply for 1 day of unpaid leave to attend the funeral of a person who is not related to the employee in the degree necessary to qualify for a paid funeral leave.

The funeral leave policy advises that, "the employee must provide verification of the absence to the Human Resources Department." (GC Exh. 6, p. 24.) In order to facilitate the verification process, the Employer issues a form entitled, Certification of Attendance at Funeral Service.[9] In order to complete this form, it is necessary to provide details about the location and time of the funeral. It is also necessary to obtain a certification from the funeral provider that the named employee attended the funeral. That certification also demands a statement as to the relationship between the employee and the decedent. Once an employee has attended the funeral, he or she presents the completed Certification of Attendance form to the human resources department which issues the paperwork required to document the excused absence from work and, if appropriate, authorization to receive funeral pay. Finally, it should be noted that the employee handbook warns employees that, "[f]alsifying information regarding the terms or conditions of a leave of absence . . . [is] grounds for immediate discharge." (GC Exh. 6, p. 19.)

Although their testimony on the point was inconsistent, it is clear that both of the Collins brothers obtained the necessary funeral leave certification forms. Roderic testified that he obtained his form from either Renata Osborne, the employee and community relations supervisor, or Nelson Griffin, at that time the employee and community relations manager. While he indicated uncertainty, he thought he had gotten the form from Osborne. However, in his pretrial affidavit, he had reported receiving the form from Griffin. On the other hand, his brother testified that he obtained two copies of the form from Osborne, telling her that, "I had an

[8] The policy specifies that the actual amount of paid leave may vary depending on the employee's work schedule. For example, if the funeral occurs on a day that the employee was not otherwise scheduled to work, no compensation for that day is provided.

[9] As Roderic explained, "that's what they use to know . . . whether to pay you or not." (Tr. 65.)

uncle passed away and that I needed some—two forms for funeral leave for me and my brother." (Tr. 231.) In any event, it is clear that the brothers did obtain the required forms.

Jimmy Napier's visitation took place at the funeral home on March 17 and his funeral was on the following day. Roderic testified that he took his Certification of Attendance to the funeral home and obtained the director's signature. He also "filled in my parts on the form where I needed to." (Tr. 65.) This included the statement that Napier was his "uncle." (Tr. 66.) His brother, Audia, provided similar testimony, indicating that he gave the funeral director the information required to complete the certification.

Once again, the brothers provided conflicting testimony as to how the certifications were submitted to their employer. Roderic contended that he returned his form to the human resources department. On the other hand, Audia testified that he submitted both his own form and Roderic's to human resources. In any event, there is no doubt that the Employer received both certification forms and that the forms claimed paid funeral leave arising from Napier's death. It is also undisputed that both certifications stated that Napier was the uncle of the Collins brothers. (See, GC Exhs. 7 and 13.) On receipt of these certifications, the Company granted 2 days of paid funeral leave to Audia and a day of paid funeral leave to Roderic.[10]

Resuming the narrative regarding the organizing campaign, it should be noted that among those employees active in the organizing effort was Jamie Gibson, a skid loader operator who has worked at the London facility for approximately 4 years. In his testimony, Gibson agreed with counsel for the Employer's characterization of his role as being "one of the main primary union organizers . . . from day one." (Tr. 746-747.) He also agreed that he "made absolutely no attempt to hide" his involvement. (Tr. 747.)

On March 17, Gibson was involved in a conversation with Tim Merritt, a production supervisor who has been employed by the Company for 12 years. He testified that Merritt approached him and asked, "I heard that you was a union steward." (Tr. 729.) Gibson denied this, explaining that this was impossible because, "we have no union in the plant." (Tr. 729.) Merritt then asserted that he had prior work experience involving a union and that unions were "no good." (Tr. 729.) He asked Gibson why he wanted a union. Gibson explained that he was dissatisfied with the Company's health insurance benefit and attendance policies. After that, the conversation ended.

Three days after Napier's funeral, on March 22, Osborne engaged in a conversation that was to have far reaching consequences in this litigation. Osborne testified that she was in Robin Baker's office on this occasion. Baker is employed as a food safety coordinator, a bargaining unit position. It is undisputed that Baker is a cousin to the Collins brothers and was also a cousin of Napier.

Osborne indicated that the purpose of her meeting with Baker was to discuss routine attendance documentation issues regarding some sanitation employees. After transacting this business, Osborne testified:

> I was actually on my way out of her office, when I remembered seeing funeral papers for Roderic and Audia Collins. Knowing that they were

[10] Roderic did not receive a second day of paid funeral leave because he had not been scheduled to work on that date. This conformed to the terms of the funeral leave policy as described in the employee handbook.

> related, I asked Ms. Baker how is your aunt doing? At that time, Ms. Baker said, I'm not sure what you're talking about. And I said, well, for the—your Uncle Jimmy Napier. And she says that's not my uncle, that's my cousin. She said did Roderic and Audia turn in funeral paper for Jimmy Napier? I said yes. She said, did they list him as an uncle? I said yes. She says that is not their uncle, this is their cousin, just like it's my cousin.

(Tr. 1316.)

Significantly, Baker also testified in detail regarding this event. Her testimony mirrored Osborne's account.[11] Thus, Baker reported that Osborne:

> asked me one day how my aunt was doing. And I said which aunt would that be, because I have several aunts. And she said, did you have an uncle that passed away? And I said no. I said, are you talking about Jimmy? Because that was the last person that we had pass away in our—in our family. And she said yeah. I said that's not my uncle.

(Tr. 1086-1087.) Baker added that she asked Osborne if the Collins brothers had gone to the funeral.[12] Osborne told her that they had. Baker then stated, "that's not their uncle either." (Tr. 1087.) After learning this information regarding Napier, Osborne immediately reported it to her superior, Griffin.

March 24 marked a significant date in the organizing drive. Howard held the last in a series of union meetings at the Hampton Inn. Approximately 40 employees attended and delivered authorization cards to him. He reported that with these additions, the Union now had the "magic number" of cards to enable the filing of a petition for a representation election. (Tr. 552.) To mark the occasion, the attendees at the meeting posed for a group photo. On the next day, Howard delivered the authorization cards and the Union's petition for an election to the Board's Regional Office in Cincinnati, Ohio.

On the following day, Griffin first raised the topic of the funeral leave with Roderic.[13] The discussion took place in his office and Roderic's shift manager, Charlene Thompson, was also present. Griffin testified that he asked Roderic, "what relation the person was to him that he took the funeral leave for. He said it was his uncle." (Tr. 1194.) Griffin then told Roderic that, "it

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[11] In addition, Roderic testified that Baker gave an identical account to an assembly of family members on October 31. The evidence from all quarters is consistent in demonstrating that Osborne stumbled onto the information from Baker showing that the brothers had attended a funeral for a cousin, not an uncle.

[12] Audia confirmed that Baker had not attended the funeral.

[13] There is a dispute about the date of this interview. Griffin's testimony that it took place on March 25 is supported by his contemporaneous written report regarding the meeting. (R. Exh. 47.) In contrast, Roderic contended that the meeting was held on April 13. I find it difficult to credit that Griffin would have waited so long after learning about the possible abuse of the funeral leave benefit. Furthermore, Roderic's account is undercut by his brother's testimony that he discussed the issue with Roderic, "by early April, April 1st, April 2nd, April 3rd." (Tr. 291.) [Counsel's words.] In that testimony, Audia also reported that prior to this conversation with his brother in early April, Roderic had already raised the issue of Napier's relationship with their grandmother. All of this supports Griffin's chronology, which I credit.

had come to my attention that this person was, in fact, his cousin and not his uncle[.] Was he sure it was his uncle[?] He said yes." (Tr. 1194.) Roderic asked Griffin who had reported that Napier was his cousin and Griffin indicated that he did not respond to the question.

In his own account of his initial meeting with Griffin about the funeral leave issue, Roderic reported that Griffin told him that "he had gotten word that [Napier] was a cousin of mine and that they were going to look into it." (Tr. 75.) By his own account, Roderic reacted angrily and continued to claim that Napier, "was Uncle Jimmy." (Tr. 162.) In his trial testimony, he claimed that he then accused Griffin of conducting this investigation due to his handbilling activities. This assertion was dramatically undercut by his impeachment with his two prior affidavits. He was forced to concede that he failed to mention this accusation of unlawful retaliation in either of those sworn statements. Given that the affidavits were provided to the Board Agent in the course of an investigation whose entire focus was on whether the Collins brothers had been fired for union activity, this failure to make such a report in either statement is compelling impeachment.

After this ominous meeting, Roderic discussed the Napier controversy with family members, including Audia. In turn, Audia reported that he discussed it with Robert Baker, Robin Baker's husband.

Shortly thereafter, the Union published the photograph of its supporters taken at the March 24 meeting on one of its websites. The accompanying headline read, "HFS/Laurel Cookies workers in London, KY file a Union Election Petition with NLRB." (R. Exh. 3, p. 2.) This publication was fully accessible to all members of the public who had access to the internet.

As may have been anticipated, publication of the photograph by the Union caused a stir among the employees and supervisors at the facility. Griffin testified that he was informed about the photo by a manager at another of the Employer's facilities on March 28. He accessed the website and viewed the photo. He testified that this was the first time that he learned of the Collins brothers support for the Union.[14] Similarly, Osborne reported that she also viewed the photo on this date.

By the same token, other employees accessed the website as well. Lisa Wells, a machine operator, testified that she obtained a copy of the photo from the internet and prepared her own caption with an antiunion message and placed copies on the tables in the employees' break room.[15] She testified that there was no involvement by management in her decision to take this action.

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[14] On the same day, he received a visit from Baker who told him that Audia had phoned her over the weekend and wanted to know why she had "ratted him and his brother out." (Tr. 1208.) During the conversation, she also confirmed to him that Napier was a cousin to her and to the Collins brothers. In her own testimony, Baker confirmed that she told Griffin, "[w]e're all cousins." (Tr. 1093.)

[15] The documentary evidence contains a photo and caption that would appear to match the description of the one created and distributed by Wells. That caption poses various questions, including, "[i]s this who you want representing you? Do you want a handful of people making your decisions? Are these really your friends?" (R. Exh. 4.) It concludes with an exhortation, "[s]tand up! We do not want or need a union!!!" (R. Exh. 4.) [Punctuation in the original. Boldface omitted.] Somewhat oddly, Wells reported that this caption was similar, but not identical, to the one she drafted.

Among those who observed the photo was Supervisor Merritt. On approximately March 29, Merritt chose to discuss the photo with several employees. He approached employees Doris Middleton and Melissa Upchurch on production line 2. Merritt asked both ladies about the picture. Upchurch testified that Middleton expressed confusion so Upchurch explained to her that the photo had been taken at a union meeting that she had not attended. Upchurch responded to Merritt's comment by confirming her own presence in the photo. Merritt replied by observing to Upchurch that, "I hope you know what you're getting yourself into." (Tr. 708.) Upchurch merely said, "okay," and Merritt walked away. (Tr. 709.)

On the same day, Merritt also discussed the photo with Gibson. The two men presented starkly different versions of their interaction on this date. In his direct testimony, Gibson presented what appeared to be a straightforward account. He reported that he was on production line 3 when Merritt approached. He was holding a copy of the photo and said, "nice picture." (Tr. 731.) Gibson agreed. At this juncture, Gibson asserted that Merritt told him to go back to his line. Gibson protested that he was at his line. He then warned Merritt that, "you can get in trouble for discussing the union to an employee." (Tr. 731.) Under cross examination, Gibson changed his account, explaining that Merritt did not tell him to return to his production line until after Gibson had warned him that, "charges could be filed on him for discussing the union to an employee." (Tr. 751.) Gibson also indicated that nobody else was present during this exchange.

In his own testimony, Merritt confirmed that he viewed the photo and approached Gibson to tell him that, "Jamie, you look good in that picture." (Tr. 971.) He reported that another machine operator, Justin Eversole, was present when he made this statement. He also indicated that Gibson did not respond to his comment. Merritt flatly denied that he told Gibson to return to his line. Instead, Merritt testified that he simply left Gibson and Eversole and "walk[ed] on." (Tr. 971.) Merritt reported that, about 6 hours later, he observed Gibson to be at least 50 yards from his assigned work area while wearing an allergen apron. This was in violation of the plant's food safety procedures.

Merritt reported that Gibson approached him at this time and warned him that, "he was going to file harassment . . . charges against me . . . over that picture." (Tr. 974.) Merritt testified that he responded by telling Gibson, "Jamie, I wasn't harassing you over that picture, I was kidding with you, like we always do." (Tr. 974.) Gibson refused to drop the matter and, "kept on and on." (Tr. 974.) Finally, Merritt instructed him "to go back to your work area. I said you're out of your work area with an apron on." (Tr. 974.) He later recommended to Gibson's supervisor that Gibson be disciplined for the food safety violation. That supervisor declined to follow this recommendation as she had not observed the violation personally.

Counsel for the Employer produced the testimony of Eversole. He confirmed Merritt's claim that he was present during the exchange with Gibson. He reported that Merritt told Gibson, "that he looked awfully good in that picture." (Tr. 1036.) Gibson did not respond and Merritt walked on.

In evaluating the conflicts in the testimony regarding this incident, I credit Merritt's account as the more accurate. It is corroborated by Eversole. In addition, Gibson's account contained inconsistencies and generally failed to make sense. While it would hardly be surprising that Merritt might react angrily to Gibson's warning about harassment, there is no apparent reason why he would respond by telling Gibson to return to his work station. All three witnesses were in agreement that the conversation occurred at Gibson's work station. It makes far more sense to conclude that Gibson has compressed two separate incidents into one

account. Thus, I conclude that after Merritt's brief comment early in the workday, Gibson became angry. Six hours later, he took the opportunity to express his anger to Merritt by warning him about harassment charges. In doing so, he departed from his work station while wearing an allergen apron in order to accost Merritt, who was located some distance away. During this rather angry encounter, it would have been entirely logical for Merritt to order Gibson to return to his station.

Finally, Roderic testified to a conversation with Merritt at around the same time. Merritt approached him and told him that, "I seen your face in that—you look pretty good in that picture there you got on the union." (Tr. 53.) He added that, "[y]ou guys could have used another route rather than going union."[16] (Tr. 53.)

While I will assess the legality of Merritt's behavior on this date regarding the photograph, it is obvious that his decision to discuss the matter with employees was controversial. Therefore, it is important to note that there was convincing evidence to establish that his behavior was not condoned by higher management. Thus, Merritt testified that, later on the same day, a meeting with the line supervisors was held by management officials. Merritt reported that, at that meeting, the supervisors were instructed not to talk to the employees about the Union.

Of course, one cannot help but note that Merritt's claim that he was ordered to refrain from union discussions was self serving in the context of this case. I was struck, however, by the fact that one of the General Counsel's witnesses provided powerful confirmation of his account. That witness, Melinda Scott, was a supervisor for the Employer at the time of these events. Subsequently, she was discharged for falsification of company records. It was evident that she was a witness who had a hostile attitude toward her former employer. Nevertheless, she confirmed that, in late March, she attended a supervisors' meeting conducted by the top managers of the facility. Those managers told the supervisors that "we didn't want the union there." (Tr. 835.) However, at the same time, she reported that they instructed the supervisors that, "if people come up, you know, we could tell them our opinion but we couldn't—you know, if they asked us questions, we could just tell them we couldn't discuss it with them." (Tr. 835.) In my view, this testimony from an adverse witness tends to support Merritt's contention that the supervisors were ordered to refrain from the sort of provocative conduct that he had been involved in earlier that day.

After the election petition was filed, the Union's campaign continued. On April 6, union supporters engaged in handbilling activity outside the plant. Roderic reported that he participated and was observed by Osborne.[17] In preparation for the representation case hearing scheduled for April 8, the Union issued a subpoena seeking information regarding employees. The Employer argued to those employees that this was an affront. It issued a notice asserting that the subpoena showed that, "[w]hen a union is in the picture, your privacy is

[16] I reject Roderic's claim that Merritt added a gratuitous admission that he wasn't supposed to talk about the Union with him. Such an admission was both unlikely and entirely absent from the accounts of Merritt's otherwise virtually identical conversations about the photo with other employees at the same time. I find that, prior to the management meeting where supervisors were instructed to refrain from making such comments, Merritt chided a number of employees about their presence in the photo. Once directed to cease, he complied.

[17] During this time period, Audia was away from the plant. He was performing a work assignment at another company facility from March 28 through April 1. (R. Exh. 11.) Thereafter, he immediately took disability leave due to back and leg problems. (R. Exh. 12.)

never safe." (R. Exh. 26.)

On April 10, Griffin transferred from the human resources manager position to his current role as manager of corporate recruiting. The next day, Mike Streny was brought in from another facility in Indiana to become the human resources manager. He reported that he first became aware of the Napier funeral leave issue on April 13 or 14.

On April 13, the Collins brothers again participated in handbilling outside the plant.[18] It is undisputed that they were observed by a variety of supervisors. Although she was uncertain of the precise date in April, Jackson testified that she also participated in this activity. While outside the plant, she held up a prounion sign. She reported that she became aware that this had come to management's notice when a supervisor, Denver Eaton, asked her, "if that was me out there at the intersection holding up a sign, and I said yes." (Tr. 321.)

Among the Employer's responses to the Union's organizing effort was the decision to hire a consultant, William Wheeler, to address the workforce. Wheeler testified that he has had more than 30 years of experience as a "consultant to management and labor." (Tr. 784.) On April 18, he gave speeches to the assembled workers for each of the plant's three shifts. The General Counsel contends that he made an allegedly unlawful solicitation to the employees to circulate an antiunion petition and that he unlawfully made implied promises to remedy employees' grievances. Because of this, it is necessary to assess the testimony of the numerous witnesses who attended these speeches by Wheeler.

To begin, Wheeler testified that he gave separate speeches to each of the three shifts. The first talk started at 1 p.m., the second began at 2:15 p.m., and the final one commenced around 9:30 to 10 p.m. At each session, he was introduced to the attendees by Sherman. He reported that, while he did not read from a script, he gave the same speech to each audience.

Wheeler reported that, near the beginning of his first talk, a couple of employees shouted out, asking "why can't we make all of this stop and go away." (Tr. 785-786.) Wheeler testified that he made the following response:

> I said that since they asked the question, that I was allowed to answer that question, and that is, that just like employees have the right to sign an authorization card under the Act, they also have the right to refrain from having the union. . . . I said the process of—of refusing to organize is, that just like you have the right to sign a card, you have the right to sign some kind of document that you can send to the union and the Labor Board letting them know that you want to stop the vote. . . . I said that if, in fact, the union accepts whatever you submit, then the vote could be basically set aside for six months with prejudice.

(Tr. 786.)

Wheeler also reported that he told the audience members at each meeting that, "anything they circulated had to be done on their own time, that management could have absolutely no involvement in the process." (Tr. 788.) Finally, he added that, "whatever they decided to circulate had no legal bearing like the Union's petition has. That it's merely a show of force. And if, in fact, the Union chooses to accept it, then they could request a withdrawal [of

[18] At the time he participated, Audia was on disability leave from his job.

the election petition] from the Board." (Tr. 789.)

During each of his speeches, Wheeler also presented the Employer's viewpoint as to topics related to the issue of representation, including the consequences of economic strikes and the parameters of the collective-bargaining process. In so doing, he reported that he read passages from a Board publication, *The Basic Guide to the National Labor Relations Act.*

Apart from Wheeler's own account of what he said at the three meetings, various employees were called by both sides to relate their own recollection of what occurred at each meeting. As to the first meeting, the General Counsel produced the testimony of Bernice Creech, while the Employer produced testimony from Laura Hubbard and Beverly Davidson.

Creech, a machine operator, reported that she attended Wheeler's speech to the first shift employees. In her direct testimony, she asserted that Wheeler told the assembly that, "they could start a petition that would stop the union election for at least six months. It would give the Company time to do better, gain their trust." (Tr. 762.)

The strength of this testimony was significantly undercut by two factors. In the first place, Creech indicated that the speech took place on June 18, or "something to that effect." (Tr. 760.) While it would be unreasonable to expect an attendee to remember the precise date, I am troubled both by Creech's attempt to name a defined date and, more importantly, by how far off her suggested date was from the actual April 18 speech.

Beyond Creech's erroneous attempt at precision, her testimony was profoundly impeached by her pretrial affidavit. That affidavit was taken a mere 3 weeks after Wheeler gave his talk. In it, she gave a specific account of the same aspect of Wheeler's speech, the circulation of an antiunion petition. She asserted that Wheeler, "told us we could start a petition, and the union would go away for at least six months. I am not sure if Wheeler solicited signatures, or told us that he would help us start the petition." (Tr. 774.) Importantly, after reviewing her affidavit, Creech conceded that it made no mention of any offer by management to use the 6-month period as a time to improve working conditions or gain the trust of the workforce. Thus, a mere 3 weeks after the speech, Creech was already uncertain in her recall of its content. Moreover, at that time, she did not make any claim that Wheeler solicited employees to defer representation in order to afford management time to make improvements or gain trust. Under these circumstances, it is appropriate to place reliance on Creech's account only to the extent that it is corroborated by other credible evidence.

Davidson, a packer/loader, also attended Wheeler's speech to the first shift. She reported that numerous employees spoke out at the meeting. She also testified that, "there was an employee that stood up and asked if there was anything we could do to put off the union vote." (Tr. 963.) Wheeler replied that, "we could have a petition, but it would put it off for six months, but it wouldn't stop it." (Tr. 963.) While she eventually signed such a petition, Davidson was clear in stating that management made no promises, either general or specific, in connection with the petition.

Hubbard, a machine operator, attended the same meeting. Her account strongly supported Davidson's. She noted that employees asked Wheeler, "how can we, like if we don't want the union, is there anything we can do, you know, to—to prolong it, or anything?" (Tr. 954.) Wheeler suggested the petition, observing that, "if there's enough signs it, it will prolong it up to six months." (Tr. 955.) As was the case with Davidson, Hubbard testified that she did sign such a petition, but that no one in management made any sort of promise or commitment in connection with the petition.

In evaluating these four accounts of Wheeler's statements at the first-shift meeting, I conclude that he raised the topic of the petition in reply to employees' questions about how to deflect the Union's attempt to organize the workforce. I further conclude that Wheeler made it clear that such a petition would have to originate from within that workforce and that management could not be involved. Finally, I reject Creech's attempt to claim that Wheeler tied the petition to an implied promise of improved working conditions. Her assertion was impeached by her own affidavit and was at odds with the testimony of the other persons who were present at the meeting.

Regarding Wheeler's speech to the second shift, the parties called 5 witnesses, apart from Wheeler. Counsel for the General Counsel offered the testimony of Rhonda Head and Melissa Asher. Counsel for the Employer called James Lindsay, Reba Scalf, and Frederick Feltner.

Machine Operator Head testified that she was an active employee participant in the meeting and that she argued with Wheeler to such an extent that he accused her of being disrespectful and directed her to cease her commentary. She contended that Wheeler brought up the petition issue by telling the audience that, "a guy from a previous meeting had stopped him and asked how to make it, referring to the Union, just go away." (Tr. 505.) At that point, Head reported that Wheeler told them about circulating a petition that could, "delay the union for six months." (Tr. 505.) She added that he asserted that, "during the six months it would give the Company time to work on the problems." (Tr. 505.)

In contrast to the highly partisan demeanor and testimony provided by Head, counsel for the General Counsel's second witness, Asher, impressed me as a prudent and careful witness whose attempt to provide a balanced account offered strong assurances of reliability. To illustrate, Asher began her description of Wheeler's statements as follows:

> [Wheeler] pretty much just told us the pros and cons. You know, what—what's good about a union, how it can help and, you know, the differences, pretty much . . . .That the union could help a lot on safety issues, you know, different stuff that happens like the—you know, they can help. Let's say, like, for instance, if you didn't have a company that—say you were working for a company and they didn't have like really good health insurance or, you know, maybe they didn't even offer no benefits, they—they can, you know, start seeing if they can get that for you, which is a good thing, you know.

(Tr. 521-522.)

Only after some prodding by counsel for the General Counsel did Asher mention Wheeler's opinions as to the negative aspects of union representation. She indicated that he raised the inevitability of union dues and the risk of strikes. After a bit more prodding, Asher discussed the topic of the petition. In stark contrast to Head's tale, Asher reported that a woman in the audience, "asked how we can make this all go away." (Tr. 523.) She reported that Wheeler's response was:

> [Y]ou can take up a petition. He said not the Company, you. You guys can take up a petition. He said take it, get a petition started, go ahead and take it from there. He said you can put it off for about six months, give you guys a—a chance for the Company to prove

itself.

(Tr. 523.)

The Employer's presentation of audience members at the second-shift meeting began with James Lindsay, a machine backup lead person.[19] Lindsay testified that an employee asked Wheeler, "what kind of rights do we have, if we don't want to have a union." (Tr. 904.) Wheeler told them, "that we had a right to a petition that we didn't want to have a union vote." (Tr. 90.4) He added that Wheeler admonished that, "we had to do it on our own time." (Tr. 905.) Lindsay reported that he was sufficiently impressed by this concept that he did draft a petition on the following day and circulated it among his coworkers. He testified that he did not have any assistance with this project.

The Employer's second witness on this topic was Scheduling Clerk Scalf, another bargaining unit member. Scalf reported that, while Wheeler was giving "his perspective of the union, the pros and cons," employees asked him, "what our rights were." (Trs. 940, 941.) She indicated that he told them that, "we could take up a petition to stop the vote." (Tr. 942.) Scalf testified that she did sign such a petition and that neither Wheeler nor anybody else in management had made any promises, either during the meeting or subsequently.

Finally, Frederick Feltner, a mixer helper, testified that, during Wheeler's speech, an employee asked, "how would he go about stopping the vote, or postponing the vote?" (Tr. 993.) Wheeler indicated that they could circulate a petition that could postpone the vote for 6 months. Feltner reported that Wheeler told them, "we could do it on our own." (Tr. 99.3) He added that he did sign such a petition, but that nobody from management solicited his signature or made any promises to him.

In evaluating the varied accounts of the second-shift meeting, I clearly reject Head's claim that Wheeler, himself, raised the topic of how employees could take action against the Union's organizing campaign. The credible evidence establishes that he told the assembled workforce about his petition idea only after employees expressed a desire to learn about how they could express their own opposition to representation. The evidence is also clear in demonstrating that Wheeler expressly advised the employees that such a petition would have to represent their own efforts and that management would not be able to participate. Beyond this, it is very clear that Wheeler did not make any specific promises to employees who would engage in this activity. Lastly, because I found Asher to be such an impressive informant, I do conclude that Wheeler made some sort of vague and general remark to the effect that a delay in the representation election would permit the Company to "prove itself." (Tr. 523.)

Apart from Wheeler, 3 witnesses described the third-shift meeting. Counsel for the General Counsel called Peggy Jackson and Robert Donaldson, both employees who have since been discharged by the Company. Counsel for the Employer presented the testimony of Tammy Powell.

Jackson's account suffered from the same sort of partisanship as the testimony that Creech had provided regarding the first-shift meeting. Thus, she reported that Wheeler told the third shift that, "we could take up a petition to keep the Union from coming in, to give him six months to make things better, to straighten up, get things back in shape." (Tr. 324) On the

[19] The parties agree that this job was a part of the bargaining unit, not a supervisory position.

surface, this account appeared clear-cut. However, under cross examination it developed that, like Creech, Jackson had provided an affidavit that contained a description of Wheeler's speech. Tellingly, this earlier account failed to make any mention whatsoever of any implied or express promise, including promises to make things better, to straighten up, or to get things into shape. This critical variance in the two sworn accounts, coupled with Jackson's obvious and understandable bias, leads me to reject her description of Wheeler's statements.

The General Counsel's second witness, Donaldson, had been a mixer for the Company. He reported that he had been fired and had filed a charge about his termination with the Board. Subsequently, he withdrew that charge. Interestingly, Donaldson did not testify that Wheeler made any express or implied promises to the workforce. He did report that Wheeler, "was talking about the Union, and we could start a petition and it will be ended for six months." (Tr. 530.) In general, Donaldson professed a limited ability to recall the speech. On the issue of whether Wheeler raised the petition sua sponte or in response to an inquiry from the audience, I do not find Donaldson's testimony to be useful.

The Employer's witness as to the third speech was Powell, a forklift driver. Powell reported that someone in the audience, "asked if they could get a petition up, you know, and if we could get enough people to sign it, how many people would it take to sign it to get the Union to go away." (Tr. 1003.) Wheeler replied that, "we could get the petition up, but he didn't know if it would do any good or not." (Tr. 1004.) Powell indicated that she did sign such a petition, but that no one from management had solicited her to do so or promised her anything in return. Finally, and significantly, Powell was asked if Wheeler, himself, made any promises to the workforce during the meeting. She testified, "[n]o, he blank told us he couldn't make any promises." (Tr. 1005.)

On examination of the accounts of the third-shift meeting, I conclude that Wheeler was asked about the possibility of employee action to demonstrate opposition to the Union. He responded by discussing the circulation of a petition, but refrained from making any promises, express or implied.

In the days following Wheeler's series of speeches, employees circulated a petition stating that they "do not want a union vote at this time." (R. Exh. 49.) It appears that 191 employees signed the petition. During this period, Wheeler spent time inside the plant and spoke to employees. Head asked Wheeler why the Company's CEO did not come and talk with the workforce. Wheeler explained that the Employer's lawyers did not permit this. Head reported that she then complained about the attendance policy and health insurance. She testified that, on hearing her complaints, a coworker interjected that if this was all that was of concern, she wished to sign the antiunion petition. Wheeler told her the name of an employee who possessed such a petition. Head also reported that she asked Wheeler if the plant would close and he declined to answer, indicating that he wished to avoid any statements that could be seen as a threat.

At approximately this time, during Wheeler's discussions on the plant floor, the General Counsel alleges that he committed 2 unfair labor practices consisting of implied promises to remedy employees' concerns if they abandoned the organizing effort. In the first of these, Rhonda Dalrymple, a machine operator, reported that in late April or early May she asked Wheeler why he was so opposed to the Union given that he also claimed that the Union would not accomplish anything for the employees. She testified that Wheeler responded that "you don't need a union." (Tr. 207.) She contends that he added a comment that, "I've only been walking around here for a week, or a few days, but I can see things that I would change." (Tr. 207.) The only specific item he mentioned was the lighting over the Oreo production line. She

reported that he added, "[b]ut I'm not here—but he said I'm not here to do—that's not my job. I'm here to explain why they shouldn't vote a union in." (Tr. 207.)

Taking Dalrymple's testimony at face value, it would lead to a conclusion that Wheeler made a vague indication that he perceived items that needed to be changed. He cited only one minor specific condition and immediately added that it was not his role to propose improvements in such working conditions. Beyond this, I have concluded that Dalrymple's testimony must be regarded with considerable skepticism given her animus against her former employer and her self-reported blithe willingness to have abused the Employer's benefit programs to her own advantage.[20]

The second conversation between Wheeler and an employee that is alleged to consist of an unfair labor practice was reported by Gibson. He testified that, sometime in May, Wheeler engaged in a discussion with a group of employees. He took Gibson aside and said, "I'm not asking you to vote no . . . . I'm just asking you to give the Company six months to change." (Tr. 735.) Gibson testified that he asked Wheeler about plant closures and Wheeler declined to discuss this matter. They also discussed the fact that the Union had lost a representation election at another of the Employer's facilities in Ohio.[21] Gibson asserted that Wheeler told him that, "they were making changes up there, and he couldn't tell me the changes that they was making." (Tr. 740.)

Wheeler was not specifically asked about these conversations with Dalrymple and Gibson. He testified generally that he walked around the plant and answered questions from employees. He reported that his responses were the same as what he had stated in his speeches on April 18. I was struck by the fact that, while Gibson was clearly attempting to demonstrate that Wheeler had made unlawful promises during their conversation, the bulk of his testimony supported the opposite conclusion, i.e., that Wheeler was aware of the legal parameters of his talking points against the Union's organizing campaign and repeatedly declined to transgress those guidelines. As to both his discussions with Dalrymple and Gibson, I conclude that he intentionally attempted to avoid any express or implied promises of benefit.

Returning now to the narrative regarding the funeral leave controversy, Griffin testified that, on April 20, he examined a copy of Napier's obituary that had been published by the funeral home. This document contains sufficient genealogical information to lead to the conclusion that Napier was not the uncle of the Collins brothers. (See, GC Exh. 5.) Armed with this confirmatory information, Griffin and Streny telephoned Audia at approximately 11 a.m.[22] They asked if he could come to the facility to discuss the funeral leave issue. He told them that his medical condition made it impossible for him to "get off the couch." (Tr. 1199.) The two supervisors then decided to proceed with the discussion by telephone. Streny asked Audia to clarify how Napier was his uncle. He told Audia that, "it had come to our attention that—that Mr. Napier was his cousin." (Tr. 1199.)

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[20] I am referring here to Dalrymple's striking testimony that she twice submitted false funeral leave certifications in order to collect paid leave that she was not entitled to receive. I will discuss this in more detail later in this decision.

[21] The Union suffered a resounding defeat in that election. Only 168 employees voted in favor of representation, while 534 voted against it. (R. Exh. 28.)

[22] Audia claimed that he had no idea why Griffin was calling him. I find this to be highly disingenuous given that he had discussed the funeral leave issue with a number of family members and was clearly aware that it could result in disciplinary problems for him.

At this point in the conversation, Audia conceded that Napier was his cousin, not his uncle. He told the supervisors that it was "confusing" and the Roderic had made a "mistake." (Tr. 1199.) He also asked, "what would happen if he was found guilty of stealing Company money?" (Tr. 1265.) They replied that this would result in his termination. Audia offered to have the pay for the 2 days of funeral leave taken from his accumulated vacation time. The discussion ended when the supervisors informed him that he was being suspended pending the conclusion of the investigation.

After this conversation with Audia, Griffin and Streny held a similar meeting at the plant with Roderic. Roderic's own testimony about the content of that meeting clearly shows that he continued to claim that Napier was his uncle until the moment he was confronted with a copy of the obituary. He explained that, after being shown this document, "that's when I said—I went ahead and told him that I had spoke with my grandmother and there was a mistake made, and that I was wrong." (Tr. 85.) He then offered to give up a day of accumulated vacation time to make up for the day of paid funeral leave. The accounts of this meeting provided by the two supervisors are essentially the same. Streny indicated that by the end of the discussion, Roderic had become "agitated." (Tr. 1269.) The meeting concluded with Roderic being informed that he was suspended and that he may be terminated.

Later that afternoon, Audia telephoned Griffin to discuss several topics related to his situation. He began by asking about health insurance coverage in the event he was terminated. Griffin explained that coverage would be affected and that the provisions of COBRA would apply. Griffin reported that Audia then provided a further explanation of his behavior as follows:

> I know there has been a problem with me saying Jimmy was my uncle for some time, but that he was afraid to come forward and tell the truth because his brother, Roderic, was a big union pusher, and that he had been advised not to say anything.

(Tr. 1204-1205.) Audia refused to answer a question about who had given him this advice. He again offered to repay the money. Finally, he told Griffin that, "he may not be able to come back anyway, that his doctor had told him because of his back injury . . . he may have to apply for disability." (Tr. 1204.)

Streny reported that after the suspensions of the two brothers, he and Carey Koplowitz, the plant manager, made the final decision to terminate their employment. He testified that they were not influenced by any union activities of the two men. Written explanations of the decision were prepared indicating that the men were discharged for "willfully falsifying . . . company reports" and "theft of company property." (GC Exh. 8 and R. Exh. 14, p. 24.)

After the termination decisions were finalized, Streny and Griffin attempted to notify both men by telephone on April 21. They could not reach Audia, but did speak with Roderic and advise him of his termination from employment. Immediately thereafter, Roderic informed Audia that he had been discharged. On hearing this, Audia left a voicemail for Griffin telling him, "that I was going to quit because I didn't know for sure if I was going to be able to return to work and . . . I didn't want this on my record." [23] (Tr. 241.)

[23] In what I consider a revealing glimpse into Audia's mindset, later in his testimony he contradicted his earlier report that he told Griffin he did not want the funeral leave issue on his employment record. He asserted that he was "pretty positive" that he did not say this to Griffin. (Tr. 296.) I conclude that this attempt to withdraw his earlier account reflects his belated

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Audia further testified that, within the hour, he "calmed down a bit," and called Griffin again. He contended that he left a second message stating that he wanted to "retract my statement about quitting, that I didn't want to quit."[24] (Tr. 241.) He also claimed that he did not receive a return phone call from Griffin, but did get a written termination notice from the Company. In contrast, Griffin testified that he answered Audia's call personally and declined to permit the rescission of Audia's resignation, telling him that it had already been accepted and that the decision "would stand."[25] (Tr. 1216.) Griffin's version is corroborated by a memorandum he composed that documented their conversation. (See, R. Exh. 47, p. 4.)

Meanwhile, despite having filed several unfair labor practice charges against the Company, on May 4, the Union filed a request with the Regional Director seeking to proceed with the representation election. (R. Exh. 51.) On the following day, the Director issued a decision and direction of election. (GC Exh. 1(ff).) That election was held on June 2 and 3.

On the first day of this election, June 2, another event occurred that figures prominently in this litigation as it led to the discharge of Jackson two weeks later. Jackson testified that, as a machine operator, she is required to wear a uniform consisting of a brown shirt, brown pants, and tennis shoes.[26] She also noted that her work shift on this date began at 9:30 p.m. She arrived at the plant at 9:15, however, she was not dressed in her uniform but was still wearing street attire due to her having attended a "funeral layout" prior to her shift. (Tr. 329.)

There is some dispute in the testimony regarding the nature of Jackson's street attire on this evening. Jackson reported that when she entered the plant through the designated employees' entrance, she was dressed in, "[a] skirt and a black top and wedge shoes." (Tr. 360.) She conceded that the shoes were open-toed and decorated with plastic stones.[27] In

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recognition that this testimony demonstrated that he knew that his conduct in claiming paid funeral leave was dishonest and properly rendered him subject to censure.

[24] The record reflects that Audia subsequently applied for unemployment compensation. I infer from this that his decision to retract his resignation stemmed from his realization of the potential consequences of such a voluntary quit on his claim for future benefits.

[25] During the trial, I raised the question as to whether this case involved an issue of alleged unlawful refusal to permit an employee to withdraw his resignation. In appropriate circumstances, the Board will find a discriminatory refusal to allow retraction of a resignation to constitute a violation of Sec. 8(a)(3). See my decision to that effect in *Northern Berkshire Community Services,* 1-CA-45210, JD-10-10, 2010 WL 805666 (March 9, 2010), and the precedents I cited at fn. 49. In the present case, all counsel agree that the evidence clearly showed that the Employer had decided to discharge Audia before he attempted to resign. Thus, there is no need to address the resignation issue separately. In any event, the outcome of such an analysis would be the same, since I do not find that the Employer acted out of unlawful animus in its response to the funeral leave issue and its effect on Audia's continued employment.

[26] Jackson explained that this was the color scheme for machine operators. The uncontroverted evidence showed that the Employer maintained detailed standards of attire that would identify individuals' job duties and, more importantly, meet objectives related to industrial safety and prevention of food contamination. These rules are termed, "Good Manufacturing Practices," and Jackson had most recently attended one of the Employer's regular training sessions about these practices on February 11. (R. Exh. 39, p. 1 and R. Exh. 40.)

[27] Interestingly, Jackson also reported that she entered the plant wearing her hairnet and ear plugs. She testified that she did so because of the Employer's required Good

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response to the Employer's subpoena, Jackson produced the clothes that she contends she was wearing that day. They are depicted in a photograph at Respondent's Exhibit 15, which shows her dressed in a blouse and skirt whose length is well below her knees.

In contrast, the Employer's witnesses testified that the clothing submitted by Jackson in response to the subpoena was not the same attire she wore on that date. Osborne testified that, when she interacted with Jackson on June 2, she was not wearing the same top as the one produced. More importantly, her skirt was much shorter, only coming to an area above her knees. This was corroborated by a contemporaneous written report prepared by the second supervisor who interacted with Jackson at the time in question, Denver Eaton. His account described her attire as, "a dress up past her knees and open-toed shoes." (Tr. 1122.[28]) Interestingly, the supervisors' descriptions are corroborated by the testimony of a discharged former employee who was presented as a witness by the General Counsel. That former employee, Roger Hall, reported that he saw Jackson inside the plant that evening wearing a "flower print dress" and high-heeled shoes.[29] (Tr. 465.) Based on the totality of the evidence on this issue, I find that Jackson was not wearing the clothing she submitted in response to the subpoena, nor was she wearing the clothing she described in her testimony. Instead, she was wearing a dress that did not cover her knees. Thus, at the minimum, her attire violated the Employer's standards both as to length of the skirt and type of her shoes.[30]

Because Jackson chose to enter the plant in street clothes, she had encounters with two supervisors who observed her clothing violations and attempted to intervene to enforce the industrial and food safety rules. At trial, Jackson and those supervisors, Osborne and Eaton, presented detailed accounts of these interactions.

Jackson testified that, on arriving at work at 9:15, while dressed in street attire, she "entered into the plant, and I was on my way to the time clock when I met Ms. Renata Osborne." (Tr. 329.) Osborne told her that she wasn't "supposed to be in here like that." (Tr. 329.)

Manufacturing Practices. This is significant since Jackson attempted to justify her street attire by claiming that she was not in a work area that demanded compliance with those practices. I find that her decision to wear the hair cover and ear protective devices demonstrates her knowledge that she was in a work area that required conformity with those industrial and food safety rules. I clearly find that the credible evidence, including a diagram and various photographs, demonstrates that the area where Jackson was observed in street clothing was in proximity to baking ovens and directly adjacent to the pathway used by forklifts that transported dough. It was certainly covered by the regulations related to food and industrial safety.

[28] For some reason, Eaton's report, marked as R. Exh. 46, is not included in the Respondent's exhibit file as prepared by the reporting company. As correctly indicated in the transcript, it was admitted into the record at trial. I conclude that there is no need to replace the missing document as the witness read its entire contents into the record in the presence of all counsel. (See, Tr. 1122-1123.)

[29] While I certainly recognize that not all men are experts at describing women's clothing, I find it impossible to conclude that even the most casual and uninformed observer would characterize the clothing submitted by Jackson in response to the subpoena as a dress. It is obvious that her submitted attire consists of a light colored skirt and a very dark top. See, R. Exh. 15.

[30] There is absolutely no dispute that her shoes did not conform to the Good Manufacturing Practices as they had heels, were open toed, and were decorated with stones. (See, R. Exhs. 16 and 17.) In addition, her skirt appears to violate the handbook's admonition that employees may not "wear loose clothing . . . when at work." (GC Exh. 6, p. 26.)

Jackson replied that she had her work clothes and shoes with her and she needed to clock in. She next reported that at the moment she arrived at the time clock, she encountered Eaton. He told her that, "you can't be in here like that any more." (Tr. 329.) She said, "okay," proceeded to clock in and go into the bathroom and change into her work uniform. (Tr. 329.) She reported that she arrived at her production area at approximately 9:25 to 9:28.

What is notable about Jackson's testimony is her determined attempt to deny that either supervisor instructed her to immediately change her clothes before proceeding any farther into the plant. This is underscored by her contention that Eaton told her she could not be in the plant "like that any more." (Tr. 329.) The thrust of her account is to suggest that the supervisors expressed their displeasure about her attire but acquiesced in her decision to proceed to the time clock and clock in before changing in the restroom. As will be described shortly, both supervisors vehemently deny this claim. Therefore, it is significant to note that Jackson's claim differs from her prior formal account of the events that evening.

Under cross-examination, Jackson was confronted with her written account of the evening's events that she had submitted to the state administrative agency in connection with her unsuccessful claim for unemployment benefits. In that statement, she reported that, "I passed by Renata Osborne and Denver Eaton, who stated, quote, 'You need to change your clothes, you can't wear them.'" (Tr. 446.) Counsel for the Employer followed up with this exchange:

> COUNSEL: Isn't it true that after Mr. Eaton told you that you needed to change, that you went and . . . you clocked in, instead of changing?
>
> JACKSON: I was already at the time clock.
>
> COUNSEL: So the answer to my question is yes.
>
> JACKSON: Yes.

(Tr. 447.) On re-direct, Jackson compounded the problem by claiming that her statement to the state agency had actually been written by her daughter-in-law who erred in writing that Eaton told her to change her clothing.[31] (See, Tr. 458.)

Osborne testified that she clearly instructed Jackson to change her clothing immediately. As she described their encounter, she noted that she approached Jackson and addressed her as follows:

> Peggy, you cannot have those clothes on this—in the factory. I'm not quite sure what you are doing. And she told me she had to because she was going to be late clocking in. And I said, but you can't be in here like this, you have to change your clothes. And, again, she told me, no, I have to clock in because I'm going to be late."

(Tr. 1320.) At that point, Jackson continued to walk away from the restroom and toward the

[31] This claim is absurd given that the daughter-in-law had not been present and was merely recording what she was told by Jackson. Furthermore, Jackson signed and submitted the statement to the agency herself.

time clock. Osborne next observed Eaton approach Jackson and again instruct her that she could not "wear that into the plant." (Tr. 1321.) Jackson continued on to the clock and punched in. Osborne immediately went to her office and wrote a report about the incident.[32]

Eaton testified that he saw Jackson come in the employees' entrance while she was "improperly dressed." (Tr. 1114.) He called out to her but she did not hear him. He then, "sped to catch up with her." (Tr. 1114.) Before he could do so, Osborne stopped Jackson and spoke to her. Eaton indicated that he did not hear their conversation. After speaking with Osborne, Jackson continued into the plant. Eaton then approached Osborne and asked her why she had permitted Jackson to remain on the plant floor in her street clothes and open-toed shoes. Osborne told him that, "she tried to stop her." (Tr. 1115.)

Eaton then managed to accost Jackson himself. He testified that he told her, "she couldn't be in the—around the oven area, the production area that way, she needed to go change." (Tr. 1117.) She told him that, "she couldn't, she was in a hurry, she had to clock in, she was running late."[33] (Tr. 1117-1118.) Whereupon, Eaton reports that Jackson walked another "25 foot, maybe 30 foot" to the time clock and punched in. (Tr. 1118.) Eaton made an immediate report of the incident to Rita Abrams, the shift manager. He told Abrams that, "Peggy was improperly dressed when she come into the factory, and that she was insubordinate to the HR manager and myself." (Tr. 1121.) Later that evening, Eaton wrote a report regarding the events.[34]

On June 3, Osborne delivered her report concerning the previous day's incident with Jackson to Streny. Also on this date, the election was concluded. Jackson was among a group of five employees and a number of supervisors who attended the ballot counting. The results revealed that the Union had received 168 votes. In contrast, 416 employees voted against union representation. (See, GC Exh. 1(r), p. 1.) On June 8, the Union filed objections to

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[32] Osborne's contemporaneous written account is consistent with her testimony and indicates that she twice told Jackson to change, "but she kept on walking." (R. Exh. 50.)

[33] This highlights what is actually a mysterious feature of this incident. Both at the time these events took place and in her trial testimony, Jackson contended that she behaved the way she did because she was running late and was fearful of clocking in late. In reality, she admitted that she arrived at 9:15 for her 9:30 shift and her time clock record shows that she clocked in at 9:19. (R. Exh. 37 and Trs. 402 and 1070.) Indeed, by punching in 11 minutes before her shift started, she actually violated a work rule that states that employees "must register by punching in no sooner than five (5) minutes prior to the start of your shift." (GC Exh. 6, p. 9.) She has never explained why she could not have gone into the restroom, changed, and then proceeded to clock in. There is no doubt that she had time to change, talk to Osborne and Eaton, clock in, and still report to her production location by no later than 9:28. I say this because she actually did all this and managed to start her shift on time. Had she chosen a different order of events, there would have been no problem. Similarly, had she chosen to comply with Osborne or Eaton's instructions, she could also have likely arrived at her work station before 9:30.

[34] Like Osborne, Eaton's contemporaneous report is consistent with his trial testimony. An interesting feature of his report is his notation that, at the time that she clocked in, "it was fifteen minutes until her shift started." (R. Exh. 46, and Tr. 1123.) I asked Eaton why he bothered to mention this fact. He told me that he noted the time because he wanted the record to reflect that Jackson was not "right on the dot pushing to clock in" and actually had sufficient time to change her clothes. (Tr. 1129.) Thus, he was commenting on the same mystery I have already discussed in the preceding footnote.

conduct alleged to have affected the outcome of the election.

On June 14, Jackson was called to a meeting conducted by Abrams. At that time, Abrams read to her from a termination report that had previously been prepared. The report, referring to the June 2 incident with Osborne and Eaton, based her termination on two separate grounds. First, it contended that her appearance in the plant in her street attire represented a violation of the required Good Manufacturing Practices. The report indicated that this constituted her third and final disciplinary infraction within the terms of the Company's progressive discipline system. In addition, the report indicated that Jackson was also being terminated for the offense of "willful insubordination or defiance of authority," an offense that required termination regardless of any past history of disciplinary actions. (GC Exh. 20.) Abrams testified that in response to this news, Jackson stated that, "she had heard Renata [Osborne] and Denver [Eaton] telling her something[,] that she told them that she had to hurry and get clocked in." (Tr. 1013.)

When Jackson returned to her home, she telephoned Osborne regarding her termination. Osborne told her that the decision was in the hands of Streny who was out of town. She indicated that she would ask Streny to contact her when he returned. Jackson reported that he never did so.

To date, neither Roderic Collins, Audia Collins, nor Peggy Jackson has been employed by the Company. The Regional Director filed his amended consolidated complaint that alleged a variety of unfair labor practices, including the discharges of these employees, on October 6. On October 11, the Director issued an amended report on objections to the election. The two proceedings were consolidated and are now before me for adjudication.

B. Legal Analysis

In conducting my analysis of the various issues presented in this case, I will begin with the allegations that the Employer engaged in certain conduct that coerced and restrained its employees and interfered with their right to obtain union representation in violation of Section 8(a)(1). I will then assess the contention that the Employer's decisions to discharge the Collins brothers and Jackson were unlawfully motivated and constituted discrimination prohibited by Section 8(a)(3). Finally, I will evaluate the Union's claim that conduct of the Employer affected the result of the election in a manner prohibited by the Act.

1. Alleged unlawful conduct by Supervisor Merritt

Chronologically, the General Counsel's first contention that the Employer violated the Act is the assertion that Supervisor Merritt conducted an unlawful interrogation of Gibson on March 17. The evidence establishes that Merritt did pose a question to Gibson on that date.

In evaluating whether Merritt's questioning of Gibson violated Section 8(a)(1), as alleged, it is necessary to employ the Board's established criteria. These were well-described in *Holiday Inn-JFK Airport,* 348 NLRB 1, 4 (2006), as follows:

> The Board applies a totality of circumstances test to determine whether the questioning of an employee would reasonably tend to coerce that employee in the exercise of Section 7 rights, thus constituting unlawful interrogation. [W]hen analyzing alleged interrogations, the Board will consider, inter alia, . . . [the following] factors: (1) The background, i.e. is there a history of employer hostility and discrimination? (2) The

> nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e., how high was the interrogator in the company hierarchy? (4) The place and method of interrogation, e.g., was the employee called from work to the boss's office? (5) The truthfulness of the reply. These and other relevant factors are not to be mechanically applied in each case. They serve as a useful starting point for an assessment of the totality of circumstances.

[Internal punctuation and numerous citations omitted.]

As the Board confirmed in *Holiday Inn-JFK Airport,* infra., its leading case on the topic remains *Rossmore House,* 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). In setting forth its totality of circumstances standard, the *Rossmore* Board quoted at length from a Third Circuit decision that powerfully articulated the statutory and constitutional considerations that led to the decision to reject any per se rule against interrogations. It is worth repeating that Court's analysis here:

> In deciding whether questioning in individual cases amounts to the type of coercive interrogation that section 8(a)(1) proscribes, one must remember two general points. Because production supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts. To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace. Moreover, as the United States Supreme Court recognized in *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 89 S. Ct. 1918, 23 L.Ed.2d 547 (1969), the First Amendment permits employers to communicate with their employees concerning an ongoing union organizing campaign, "so long as the communications do not contain a threat of reprisal or force or promises of benefit." Id. At 618, 89 S. Ct. at 1942. This right is recognized in section 8(c) of the Act. If section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution. What the Act proscribes is only those instances of true "interrogations" which tend to interfere with employees' right to organize.

Graham Architectural Products v. NLRB, 697 F.2d 534, 541 (3d Cir. 1983). [Footnote omitted.]

Gibson testified regarding the content of his exchange with Merritt that took place on the plant floor on March 17. He reported that Merritt approached him and stated that he had, "heard that you was a union steward." (Tr. 729.) Gibson told him that this could not be so, since "we have no union in the plant." (Tr. 729.) Gibson testified that Merritt followed this with the observation that, "I used to work for a union, and . . . they was no good." (Tr. 729.) At this point in their discussion, Merritt, "asked me why—why I wanted a union in." (Tr. 729.) Gibson answered that it was due to his dissatisfaction with the Employer's health insurance benefit and attendance policies. With that, the conversation ended.

Applying the Board's criteria to this brief exchange, I begin by noting that there was no prior history of either employer hostility to Section 7 rights or any acts of unlawful coercion or

discrimination. Thus, the amended consolidated complaint does not assert that this Employer engaged in any unfair labor practices prior to this date. The record does reflect that the Employer had expressed its opposition to the Union by a letter dated February 3. This does not tilt the evidence toward the General Counsel's position. As the Board has stated in this connection:

> Prior to the questioning at issue here, the Respondent did voice its opposition to the unionization of its work force in various ways. However, none of these statements contained any threats or promises, and they are thus protected free speech under Section 8(c) of the Act. In these circumstances, we do not believe that the factor of "employer background" lends any significant support to the allegation that the question here was coercive.

John W. Hancock, Jr., 337 NLRB 1223, 1224 (2002), enf. 73 Fed. Appx. 617 (4th Cir. 2003). [Footnotes omitted.]

I have also considered the fact that the General Counsel alleges that the Employer committed a variety of unfair labor practices in the weeks following this interrogation. In the first place, as I will discuss shortly, I have concluded that the General Counsel did not meet his burden of proving those claims. Even if I had found some or all of those alleged violations, there is simply no logical connection between those alleged unlawful acts and Merritt's earlier conversation with Gibson. See, *Temp Masters,* 344 NLRB 1188 (2005), affd. 460 F.3d 864 (6th Cir. 2006) (subsequent unfair labor practices are only relevant as to the background of interrogation where there is some "relationship between the two events"). Thus, I find that the factor of employer background does not support a conclusion of unlawful conduct by Merritt.

The next analytical factor is the examination of the content of the question or questions that were posed to the employee. In particular, the Board holds that the type of content which constitutes hallmark evidence of coercion is whether the questioning was designed to elicit information "on which to base taking action against individual employees." *Rossmore House,* supra at 1117. Merritt's question was not designed to uncover information about any individual employees' activities or sympathies.[35] He was merely seeking to understand Gibson's reasons for supporting the Union.[36] This factor does not justify a finding of unlawful conduct.

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[35] It is vital to note that Gibson testified that he was an early and prominent union organizer at the plant and that he made absolutely "no attempt to hide it." (Tr. 747.) As counsel for the General Counsel correctly observe, "Gibson acknowledged that he was one of the primary union organizers whose pro-union sympathies were visible from the outset of the organizing campaign." (GC Br., at p. 5.) For this reason, I conclude that the context establishes that Merritt's teasing remark about Gibson's supposed appointment as a union steward was not an attempt to gain information about any specific activity by Gibson. Both men well understood that Gibson's assumption of any steward's position would have to await the outcome of the campaign. There is certainly no possible contention that Merritt was seeking individual information about anyone else.

[36] Counsel for the General Counsel cite *Jakel Motors,* 288 NLRB 730 (1988), enf. 875 F.2d 644 (7th Cir. 1989) for the proposition that a question designed to reveal the reasons for an organizing campaign is unlawful even in the absence of any coercive threats or promises. While the trial judge made a broad statement to this effect (288 NLRB at 735), the Board expressly declined to pass on the issue as any finding would have been cumulative to other findings of clear-cut unlawful interrogations. (288 NLRB at fn. 2.) In my view, the judge's

Continued

Analysis next turns to the identity and status of the questioner. Merritt was not a high level corporate official. He was a production supervisor, but, at the time in question, he did not provide any direct supervision of Gibson. Furthermore, Gibson testified that the two men spoke to each other on a daily basis and that their discussions were friendly and included joking around with each other. As he put it, "we probably did have a good relationship." (Tr. 746.) While I recognize that a prior friendly relationship is not a guarantee of the absence of coercion, in the circumstances of this case, I conclude that neither Merritt's status in the plant nor his prior relationship with Gibson support the General Counsel's allegation.

The remaining factors also fail to provide evidence of unlawful interference with Gibson's Section 7 rights. The discussion took place on the plant floor and was very brief. It certainly did not bear any indicia of heightened formality or other aspects of a coercive setting. Finally, Gibson's reply to Merritt's question appeared to be both truthful and freely expressed. Nothing in his reply gives rise to any inference of fear or intimidation.

On my examination of the context made with appreciation of the realities of the industrial workplace, I find that nothing in Merritt's statement on this occasion violated the Act. His conduct was certainly no more problematic than the questioning of a union supporter's wife as to why her husband thought they needed a union in *Uarco,* 286 NLRB 55, 56 (1987), rev. denied 865 F.2d 258 (6th Cir. 1988), where the Board found "nothing coercive."[37] Because he did not pose his question in a manner that would cause a reasonable employee to feel coerced, intimidated, or restrained in the ability to exercise Section 7 rights, Merritt's conduct was not unlawful.

The General Counsel also asserts the Supervisor Merritt violated Section 8(a)(1) by threatening Gibson on March 29. As I have previously indicated, Merritt and Gibson presented widely divergent reports about their interaction on that day. I have credited Merritt's version because it was logical, consistent, and corroborated by an eyewitness, Eversole. In contrast, Gibson's account was inconsistent and illogical.

The credible evidence establishes that the two men had a brief exchange early in the shift regarding Gibson's appearance in the photo of union supporters. Having been angered by Merritt's statement regarding that photo, some hours later Gibson took the opportunity to leave his production line while dressed in an allergen apron. His purpose was to confront Merritt and warn him that his statement may lead to labor relations litigation. In response to Gibson's heated words, Merritt chose to terminate the confrontation by ordering Gibson to return to his work station. He warned Gibson that

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formulation would impose a per se rule in express contradiction of the fundamental principles articulated in *Rossmore House*, supra, and its many progeny. I believe the Board would reject such an approach.

[37] See also, the Court's interesting discussion of a similar instance of questioning in *NLRB v. Acme Die Casting Corp.,* 728 F.2d 959, 963 (7th Cir. 1984). In that case, the alleged interrogation "was confined to a single question asked of a single worker, a question neither tendentious nor intimidating either in content or inflection, asked casually and in a friendly manner, and not followed up." As the Court observed, "It would have been better had [the employee's] supervisor not asked him about the union, but unless questioning, however gratuitous, can fairly be deemed coercive, it cannot be made the basis for an unfair labor practice finding." 728 F.2d at 963.

his conduct rendered him subject to disciplinary action.

In evaluating whether an Employer's statements or actions constitute an unlawful threat of reprisal for protected activities, the Board employs the following objective standard:

> An employer violates Section 8(a)(1) by acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board employs a totality of circumstances standard to distinguish between employer statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their union activities, and employer statements protected by Section 8(c).

Empire State Weeklies, 354 NLRB No. 91,slip op. at p. 3 (2009) [Citations and certain internal punctuation omitted]. In this regard, the Board also has stressed that,

> [I]n considering whether communications from an employer to its employees violate the Act, the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect.

Scripps Memorial Hospital Encinitas, 347 NLRB 52, 52 (2006) [Citation and internal quotation marks omitted].

In applying these criteria to the events that took place on the shop floor on March 29, the parties urge sharply different interpretations. Noting that both participants in the interaction under scrutiny agree that Gibson warned Merritt that he was engaged in improper conduct regarding the organizational campaign, counsel for the General Counsel argue that, "the fact that Merritt's disciplinary threat immediately followed Gibson's admonition demonstrates that it was an obvious effort to intimidate Gibson about his union activities and sympathies." (GC Br., at p. 34.)

In contrast, counsel for the Employer contend that Merritt's warning to Gibson that he was subject to potential disciplinary action had nothing to do with any protected union activity. As they explain, "it is clear that Merritt did not threaten Gibson with discipline to discourage his Union activities. Rather, Merritt instructed Gibson to return to his line because Gibson was violating the Employer's well-defined policies, i.e., wearing an allergen apron when off the peanut butter line—a policy that Gibson was aware of and that the Employer had consistently enforced." (R. Br., at p. 28.)

In resolving this dispute, I find that the credible evidence establishes that, out of a desire to confront Merritt, Gibson chose to depart from his work station while failing to remove his allergen apron. In taking this impulsive action, he violated work rules, particularly important food safety and contamination standards vital to the Employer's business process. Merritt's subsequent threat of disciplinary action was directed toward

this misconduct, not any protected union activity. As the Board has explained, when evaluating an allegedly unlawful threat, "[t]he issue is what the employees who were there would reasonably understand in the circumstances." *Miller Industries Towing Equipment,* 342 NLRB 1074, 1076 (2004). Objectively, an employee in Gibson's position, away from his work station in violation of food safety procedures, would comprehend that the supervisor's threat of disciplinary action was directed at his work-related misconduct, not his prounion sympathies or activities. For this reason, I find that the General Counsel has failed to meet his burden of establishing that Merritt uttered an unlawful threat.

2. Alleged unlawful conduct by Consultant Wheeler

The General Counsel contends that the Employer's consultant, Wheeler, made unlawful solicitations for employees to circulate an antiunion petition and implied promises to correct employees' grievances during his 3 speeches to the workforce on April 18. He is also alleged to have made such an implied promise to Employee Dalrymple in late April or early May. Finally, he is alleged to have made another such implied promise to Employee Gibson in late May.

Turning first to the contents of Wheeler's speeches on April 18, I have already noted that a large number of witnesses provided conflicting accounts of what was said. In resolving the conflicts in these accounts, I observed that the General Counsel's witnesses' versions were often marked by striking inconsistencies with their prior sworn statements. In those statements which were given at a time more proximate to the actual events, the witnesses did not make the key assertions that underlie the General Counsel's claims. With a few limited exceptions, I have credited the accounts provided by the Employer's witnesses, including Wheeler himself.

As to the credited evidence, I conclude that at each meeting Wheeler did advise the employees that they could manifest their opposition to the representation election by circulating a petition to that effect and submitting the signed petition to the Union for its consideration. He went on the explain that, if the Union were sufficiently impressed with such a demonstration of employees' sentiments, it could request a cancellation of the representation election. Wheeler opined that this would delay any further representation proceedings for a period of 6 months.[38]

It is noteworthy that the credible evidence from attendees at each of the 3 meetings established that Wheeler only offered this suggestion after being specifically asked at each meeting if there were steps that antiunion employees could take to oppose the holding of the representation election. Wheeler also took pains to explain that the Employer could not participate in this activity and that it would have to be performed on the employees' own time.

As the lawyers for both parties indicate in their briefs, the law governing the propriety of an employer's discussion of the circulation of an antiunion petition has evolved in the context of

[38] As suggested by counsel for the Employer, Wheeler's remarks appear to be consistent with the provisions of the Board's *Casehandling Manual, Part 2, Representation Proceedings*, Sec. 1112.1(a), which provides that, "[w]here, after the . . . close of a hearing, but before the holding of the election, the petitioning union, the sole union involved, requests timely withdrawal of its petition, the request should be approved with six months prejudice and the election should be canceled." [Internal citations omitted.]

decertification petitions in workplaces that have existing union representation. Like the lawyers, I have not been able to find a case involving the issue in the circumstances presented here. I suspect that this is an indication that Wheeler's suggestion to the employees represented his own unique approach to the Board's representation procedures. In any event, I see no meaningful differences that would suggest the inapplicability of the precedents arising from decertification cases.

Relatively recently, in *Corrections Corporation of America,* 347 NLRB 632 (2006), the Board has addressed the significant evidentiary factors involved in assessing a claim that an employer unlawfully involved itself in the circulation of a decertification petition. In that case, the Board found the employer's involvement unlawful because:

> The credited testimony establishes that the Respondent's communications about decertification were not prompted by employee inquiries and that the idea of decertifying the Union was conceived by the Respondent and then proffered to the employees. There is no credible evidence that any employee ever asked the Respondent how to get rid of the Union.

347 NLRB at p. 633. [Citation omitted.]

Of course, in the case before me, the situation is entirely different. Here, the Employer's agent was confronted with repeated questions from concerned employees who wanted to know what steps could be taken to head off a union election. When a similar situation has arisen in a decertification context, the Board has held that:

> It is not illegal for an employer to furnish information to employees when the employees have independently decided to exercise their statutory right to decertify a union and seek their employer's advice and their employer other than providing the requested information does not actively encourage, promote, or assist the employees in repudiating their collective-bargaining representative.

Amer-Cal Industries, 274 NLRB 1046, 1051 (1985).[39] [Citations omitted.]

I conclude that Wheeler's creative, but somewhat idiosyncratic, suggestion that

[39] I note that counsel for the General Counsel cite *Central Washington Hospital,* 279 NLRB 60 (1986), affd 815 F.2d 1493 (9th Cir. 1987), in support of their assertion that Wheeler's statements about a petition violated the Act. It is true that the Board affirmed the trial judge's conclusion that the employer had violated the Act by its involvement in the circulation of a decertification petition. The judge made a broad statement that an employer's instigation or promotion of a "union repudiation document" is unlawful. However, the Board's finding of an unfair labor practice in that case must be seen in light of the credited evidence establishing that the employer's supervisor "read over the proposed decertification petition and indicated approval, a supervisor permitted the use of the Hospital Xerox equipment to duplicate the decertification petitions, and Respondent permitted an employee to circulate the decertification petition on company time and property." 279 NLRB at p. 64. Nothing remotely comparable happened in the present case.

employees could submit a petition to the Union aimed at demonstrating such a degree of antiunion sentiment that the Union might decide to withdraw its petition for an election with a resulting 6-month bar to any new election petition by the Union, was not unlawful in the particular circumstances of his speeches. His suggestion was only made after direct inquiry as to the possible actions that antiunion employees could take to make their views known. It was not accompanied by any offer of support from the Employer. Employees were specifically counseled that such a petition would have to be their own product and represent their own independent efforts. As such, Wheeler's statements constituted protected speech within the meaning of Section 8(c).[40]

The General Counsel believes that Wheeler's discussion of the petition also violated the Act because it contained an implied promise of benefit if the employees rejected union representation. I have already explained that I do not credit the bulk of the testimony claiming that Wheeler made any express or implied promises during his 3 speeches. Those accounts were biased, and their authors were impeached by their striking failures to mention these supposed promises in their earlier sworn statements. The one exception involves the testimony of Employee Asher. She was a compelling witness due to the objectivity she displayed in her account. Thus, I credit her statement that Wheeler remarked that the 6-month delay in the event the Union withdrew its request for an election in the face of strong antiunion sentiment expressed in an employee petition would afford the Company a chance to "prove itself." (Tr. 523.)

The General Counsel also cites two other examples of what he considers to be unlawful implied promises of benefit if the workforce rejected the Union. The evidence offered in support of these two alleged unlawful statements consisted entirely of the testimony of a single individual in each instance. The demeanor and presentation of those two employees, Dalrymple and Gibson, were strongly suggestive of bias. This impression was reinforced by the contents of their overall accounts of the events at issue in this case. Thus, I found Gibson's descriptions of his interactions with Merritt to be distorted in a manner that was intended to support the Union's claims. Of greater concern, I found Dalrymple's testimony regarding her own admitted misconduct in submitting false claims for paid leave to demonstrate her unreliability as an informant as to the matters involved in this litigation.[41] In contrast, I found Wheeler's testimony to be generally credible, including his report that in conversations on the

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[40] Referring to recent developments in labor law, counsel for the Employer argues, "[i]f any speech is to be protected by the First Amendment and 8(c), it must be speech that involves an employer advising its employees of their rights protected by the Act. To find otherwise would fly in the face of the Bill of Rights, Board law, and the Board's recent rulemaking endeavor to force employers to advise their employees of their rights under the Act." (R. Br., at p. 31.)

[41] Even if one were to accept the testimony by these two employees, it does not demonstrate any violations by Wheeler. Dalrymple reported that Wheeler observed that it would be beneficial to improve the lighting over the Oreo production line. She acknowledged that, immediately thereafter, he disclaimed any implication that he would secure such improved lighting, telling Dalrymple that this was "not my job." (Tr. 207.) In any event, there was absolutely no testimony that lighting was considered a relevant issue in the election. The testimony was remarkably clear from numerous witnesses in showing that the issues that were the focus of concern involved the Employer's health insurance benefit and attendance policy. As to Gibson, the most he claimed was that Wheeler made the same suggestion he had offered on April 18. His argument was not that the workforce "vote no," but only that they seek a delay to "give the Company six months to change." (Tr. 735.) Gibson conceded that Wheeler specifically declined to discuss the contours of any such changes.

shop floor, he adhered to the same positions that had been presented in his speeches on April 18.

Given my credibility findings as to the asserted promises of benefits by Wheeler, it is only necessary to assess the legal status of one such statement, Asher's recollection that Wheeler opined that a 6-month delay in the election process would give the Company a chance to "prove itself." (Tr. 523.)

There can be no doubt that an employer's promise of benefits may constitute a violation of Section 8(a)(1). As the Board has explained, "[s]uch promises made in the course of urging employees to reject unionization are unlawful because they link improved conditions to defeat of the union." *DynCorp,* 343 NLRB 1197, 1198 (2004), affd. 233 Fed. Appx. 419 (6th Cir. 2007). Nevertheless, it is vital to examine the precise contours of any such statements and their context. In particular, the Board has repeatedly stressed the importance of avoiding an unrealistic application of this principle.[42]

Wheeler's reference must be seen in light of the fact that his speech came within the first year of operations under the new management of Hearthside. Beyond this, it is clear that Wheeler did not raise any specific improvements that might flow from a postponement of the opportunity to select union representation. His request that management be given an opportunity to prove itself is consistent with a long line of Board precedents that have rejected the attempt to characterize and ultimately proscribe such vague remarks by defining them as unlawful promises of benefits.

Almost 40 years ago, the Board rejected the General Counsel's claim that an employer's "promise that I will do my best" was an unlawful statement. *Uarco, Inc.,* 216 NLRB 1, 3 (1974). It noted that such an assertion, "does nothing that would support or reinforce employee anticipation of improved conditions of employment that might make union representation unnecessary." 216 NLRB at p. 3.

In what is perhaps its leading case on this topic, *National Micronetics,* 277 NLRB 993 (1985), the Board considered the legality of a new supervisor's request that employees give the company "more time or a second chance." 277 NLRB at p. 993. Ultimately, the Board concluded as follows:

> We find that both of these statements are too vague to rise to the level of illegal promises of benefits or objectionable conduct. The statements do not promise that anything in particular will happen. Instead, the Respondent indicated a general desire to make things

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[42] In my own view as shaped by my experiences as a labor law judge, such realism is an essential concomitant of the vital principles of industrial democracy. The Act's election mechanisms are grounded in the fundamental belief that an uncoerced electorate will possess the intelligence, judgment, and common sense needed to make a sound collective determination of whether to invoke the right to union representation in any given workplace. I think it natural that such an electorate would consider the impact on the employer if the voters should reject the union. Among the possible reactions from such an employer could certainly be a sense of gratitude toward the workforce and a desire to foster and enhance workers' ongoing sense of basic satisfaction with the terms and conditions of their employment. Thus, when an employer makes a vague request for an opportunity to prove itself, it is hardly injecting some new idea into the mix. Such a concept is inherent in a voter's preelection calculus.

> better. Generalized expressions of this type, asking for "another chance" or "more time," have been held to be within the limits of permissible campaign propaganda. Therefore, we dismiss the allegations that the statements were unlawful promises in violation of Section 8(a)(1) of the Act, and we overrule the objection based on these statements.

277 NLRB at 993. [Footnotes omitted.] See also, *Flamingo Hilton Laughlin,* 327 NLRB 72 (1997), enf. in pertinent part 148 F.3d 1166 (1998) ("plea for a chance to do more" was not an impermissible promise of benefits); *Noah's New York Bagels,* 324 NLRB 266, 267 (1997) ("vote to give us a second chance to show what we can do" within the limits of permissible campaign propaganda per *National Micronetics*); and, very recently, *Newburg Eggs,* 357 NLRB No. 171 (2011), slip op. at pp. 2-3 (in context, "give me one more chance" was not an impermissible promise of future benefits).

Applying these precepts to Wheeler's request for more time for Hearthside to prove itself to the workforce, I conclude that this statement was too vague and innocuous to represent unlawful restraint, interference, or coercion. Indeed, the remark simply stated the obvious, that any delay in obtaining union representation would afford the Employer more time to demonstrate that it would manage the facility in a manner that would prove to be satisfactory to the majority of the employees. I have already indicated that such an implication arises automatically from the circumstances involved in the election campaign and does not inject anything into the voters' calculus that is not already obvious to the electorate. I do not find that Wheeler made any impermissible promises to the workforce on April 18 or thereafter.

3. The allegedly unlawful terminations of the Collins brothers

The General Counsel contends that the Employer unlawfully discriminated against Audia and Roderic Collins by discharging them in retaliation for their union activities and sympathies in violation of Section 8(a)(3) of the Act. In contrast, the Employer asserts that it discharged the two men for workplace misconduct consisting of "willfully falsifying . . . company reports" and "theft of company property." (GC Exh. 8.) This presents a classic issue requiring analysis by use of the Board's methodology for assessment of claims involving alleged dual motives. That methodology was established in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983).[43]

In *American Gardens Management Co.,* 338 NLRB 644, 645 (2002), the Board provided

[43] Counsel for the General Counsel make the interesting observation that, in the *Wright Line* case itself, an employee was discriminatorily discharged by an employer who cited falsification of company records as the pretextual reason for the termination. However, the credited facts in that case showed that the Employer dispatched a manager to obtain evidence to support a disciplinary discharge. The evidence obtained by that manager was insignificant because the incorrect notations made by the employee did not affect the work process and, most importantly, did not "inure[ ] to his benefit." 251 NLRB at 1091. Beyond this, the discipline was shown to be inconsistently harsh when compared to prior comparable situations. As will be discussed, none of these considerations apply here. Instead, these employees filed false paperwork in order to obtain an financial benefit that they were not entitled to receive. The employer discovered this by accident and its disciplinary response was entirely consistent with its actions in other situations where employees had filed false documents to receive financial benefits.

a comprehensive summary of the *Wright Line* analytical process:

> *Wright Line* is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. In *Wright Line*, the Board set forth the causation test it would henceforth employ in all cases alleging violation of Section 8(a)(3). The Board stated that it would, first, require the General Counsel to make an initial showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. If the General Counsel makes that showing, the burden would then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The ultimate burden remains, however, with the General Counsel. [Internal punctuation and citations omitted.]

The Board's exposition of the test goes on to outline the nature of the General Counsel's burden, including the requirement that four elements must be proven by a preponderance of the evidence. These include the existence of protected activity, the employer's knowledge of such activity, the imposition of an adverse employment action, and "a motivational link, or nexus, between the employee's protected activity and the adverse employment action." 338 NLRB at 645. [Citation omitted.] If the General Counsel sustains his burden of proof regarding these elements, a rebuttable presumption of unlawful discrimination is created. The burden then shifts to the employer to demonstrate that the same adverse action would have been imposed even in the absence of the employee's protected activity.

As to the Collins brothers, the Employer forthrightly concedes that the first three elements of the *Wright Line* test are established in the record. (See, R. Br., at p. 34.) The brothers clearly engaged in union activities which came to the attention of their employer prior to their discharges. Of course, those discharges represented highly adverse employment actions.

The battle is joined at the issue of whether the General Counsel has met his burden of showing that a substantial motivating factor in the Employer's decision to fire the Collins brothers was their participation in protected union activity and their sympathy for the Union's cause. Resolution of this conflict requires a wide ranging and realistic appraisal of the key events and their surrounding context. Among the critical parameters of this evaluation are the following considerations listed by the Board:

> Proof of discriminatory motivation can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. To support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment of certain employees with similar work records or offenses, deviation from past practice, and proximity in time of the discipline to the union activity.

Embassy Vacation Resorts, 340 NLRB 846, 847 (2003), rev. dismissed, 2004 WL 210675 (DC Cir. 2004). [Citations omitted.]

In conducting this required analysis, I will examine the evidence relied on by the General Counsel in support of his contentions. In addition, I will also consider the evidence adduced by the Employer regarding its motivation. See, *American Gardens Management Co.,* supra at fn. 5 ("the employer may submit evidence to undermine the General Counsel's showing regarding any of the four elements, and this evidence must also be considered in determining whether the

General Counsel has established these four elements by a preponderance of the evidence").

Turning first to the direct evidence on the issue of animus against the supporters of the Union, it must be observed that the record is largely barren of credible reports of this type. Counsel for the General Counsel can cite to only two potential examples. First, they offer the testimony of Melinda Scott, a discharged former supervisor. She reported that she saw Osborne and Merritt looking at the photo of union supporters, including the Collins brothers. She claimed that she heard Osborne state that "there was going to be a lot of people out of a job." (Tr. 840-841.) This account was denied by Osborne and Merritt.

I did not find Scott's demeanor, presentation, and proffered version of events to be credible. It was apparent to me that she bore ill-will toward her former employer. It is noteworthy that she was fired from her supervisory position for precisely the same type of offense that was involved in the Collins' termination. Thus, she was discharged on August 10 for falsifying her time sheet to claim that she was at work 45 minutes prior to her actual time of arrival. (See, R. Exh. 33, p. 2.) Apart from the fact that Osborne had no decision-making role in the termination of the Collins brothers, I do not credit Scott's claim that she expressed the sort of blatant animus described.

The only other direct evidence of animus cited by the General Counsel consists of Sherman's letter to the workforce urging that the employees reject the Union's attempt to organize the workplace and Merritt's comments to employees expressing his negative view of the Union. There is no claim that Sherman's letter violated the Act. As to Merritt, I have already described my conclusion that his statements and questions to employees did not constitute violations or objectionable conduct. While I agree that these statements may be considered as part of the context for the events under examination, they do not constitute proof of unlawful animus as opposed to mere opposition to the attempt to organize the workforce.[44] The situation in this regard is similar to that described by the trial judge in *Hanson Material Service Corp.,* 353 NLRB No. 10 (2008), slip op. at p. 22 (employer's expressed opposition to the union, even when accompanied by several relatively minor unfair labor practices, did not show the "kind of union animus against [discharged employees] that would lead to the inference that it discharged them for their union activities"). Such a conclusion is even more appropriate here, where the evidence does not establish that the Employer engaged in any unlawful activity but simply expressed its opinion against the Union's organizing effort. Indeed, an attempt to base a finding of unlawful animus centered on such statements of opinion would contravene the provisions of Section 8(c).

Having concluded that there is no credible direct evidence of unlawful animus against the Collins brothers arising from their protected activities, I have carefully considered the variety of tools the Board uses to determine whether circumstantial evidence gives rise to an inference of unlawful motivation. The first such tool raised by the General Counsel is the timing of the adverse action. There is no doubt that the discharges occurred during the critical period leading to the representation election and within a period of weeks from the time that the brothers engaged in highly visible protected activities such as leafleting.

Although there is evidence of proximity in the timing of events, it is equally clear that the adverse action was also close in time to the brothers' submission of funeral leave certifications

[44] As the Board has explained, such "antiunion campaign literature" should be treated as "background evidence." *Embassy Vacation Resorts,* 340 NLRB 846, fn. 15 (2003), rev. dismissed, 2004 WL 210675 (D.C. Cir. 2004).

that sought paid leave for attendance at a cousin's funeral contrary to the Employer's funeral leave policy. In such circumstances, the Board has made its position clear:

> While the employees' union activities and the discharges did occur within a relatively brief time period, so, too, was there a close proximity in time between the employees' blatant misconduct and the Respondent's decision to terminate them. Under these circumstances, the factor of timing is too weak a foundation upon which to base a finding of pretext.

Syracuse Scenery & Stage Lighting Co., 342 NLRB 672, 675 (2004).

The General Counsel next alleges what is characterized as "[g]laring evidence of disparate treatment" of the Collins brothers when compared to other employees. (GC Br., at p. 44.) While conceding that the Employer maintains genuine preexisting work rules prohibiting falsification of company documents and warning employees that providing false information regarding "the terms or conditions of a leave of absence . . . [is] grounds for immediate discharge," the General Counsel submits that the Employer has on another occasion gone so far as to facilitate the same sort of misconduct that formed the basis for the decision to discharge the Collins brothers.

This rather startling claim is based entirely on the testimony of discharged former employee, Dalrymple. As I have previously noted, in a breezy manner indicative of a lack of any scruples regarding abuse of the Employer's funeral leave policy, Dalrymple described two instances where she knowingly and intentionally submitted false funeral leave certifications in order to obtain paid leave that she was not entitled to receive. Dalrymple claimed that she had told Osborne that her funeral leave request for an "aunt" was actually for a deceased friend. According to her account, Osborne connived with her to authorize improper payment for attending the friend's funeral. When asked about this episode, Osborne provided a convincing explanation. She testified that Dalrymple had once informed her that she had a friend who was suffering from a terminal illness. However, when submitting her claim for paid leave for a deceased aunt, she never told Osborne that the funeral was actually for this friend. As she explained, "I do remember Ms. Dalrymple, you know, telling me about her friend that was so sick, but not in relation to the funeral leave." (Tr. 1347.) I credit Osborne's account and reject Dalrymple's attempt to insinuate that Osborne actively participated in her falsification of the request for paid leave. That account, provided by a biased witness, was inherently improbable.

In examining whether the Employer applied its existing work rule against falsification of leave documents in a consistent manner, I have also considered the evidence submitted by that Employer. While several management officials testified that they had never been confronted with proof of falsification of requests for paid funeral leave in the past, they had addressed similar violations of the same work rule.[45] The documentary evidence entirely supports this testimony. Thus, the Company's disciplinary records show that, during 2009, three employees, Christopher Smith, Joanna Smith, and Mike Desimone, were terminated for falsifying company records. In each case, the offending employee submitted false claims that resulted in their

[45] The Board has recognized that it may be "rare" to find cases of prior discipline that are identical to the events involved in an alleged unlawful termination. Absent evidence of disparate treatment, in such circumstances an employer need only show that it had an existing work rule and "that the rule has been applied to employees in the past." *Merillat Industries, Inc.,* 307 NLRB 1301, 103 (1992). That is precisely the situation presented in this case.

receipt of unemployment benefits despite the fact that they remained employed by the Company. (See, R. Exh. 43, pp. 1, 3-4, and 5-6.) I agree with the Employer's contention that each of these employees was discharged for the same general type of misconduct as that committed by the Collins brothers, i.e., the submission of false information in order to claim financial benefits that they were not entitled to receive. As a result, I conclude that there is no evidence of disparate treatment or deviation from past practice and probative evidence of consistent application of disciplinary sanctions.

Finally, I think it necessary to address a larger claim that is implicit in the General Counsel's prosecution of this unlawful discharge claim and explicit in the self justifications provided by the Collins brothers in their testimony. In their interactions with management officials and in their accounts provided to me at trial, both brothers assert that they did not knowingly claim paid funeral leave for attendance at their cousin's funeral. There are three reasons why I cannot accept this attempt to justify their behavior. In the first place, the evidence strongly suggests that, at the time they submitted their certification forms, the brothers did know that Napier was their cousin, not their uncle. In the second place, there is overwhelming evidence that they possessed this knowledge during the course of the Company's investigation of their conduct and failed to come forward with the information. Finally, even if one were to accept their version of events, it still demonstrates that they knowingly submitted a claim for funeral leave for a deceased relative who did not fall within one of the categories of familial proximity that authorized paid leave.

In evaluating whether the Collins brothers engaged in misconduct by intentionally presenting a claim for attending an uncle's funeral when they knew that the deceased was not their uncle, I start from a consideration of what the Board terms the "inherent probabilities" of a common human situation. *Panelrama Centers,* 296 NLRB 711, fn. 1 (1989). Roderic, himself, has observed that it appears "odd . . . to mistake a relative, a placement on your family tree." (Tr. 168.) Indeed, in a letter he wrote to the Unemployment Commission, he admitted that it appeared, "ridiculous . . . that someone can mistake a cousin for an uncle." (GC Exh. 9, p. 3.)

Turning to the evidence regarding family ties, it shows that Roderic is 38 years old and his brother, Audia, is 34. During the time in question, the brothers lived next door to each other. Their mother, Phyllis Collins, lived with Roderic. In addition, their maternal grandmother, Mae Willis, also lived with Roderic. The brothers worked for the same employer as their cousin, Robin Baker. Bakers' parents were neighbors of the Collins brothers. Audia testified that Baker's husband, Robert, was, "a best friend, like a brother to me." (Tr. 239.) The overall picture presented was of a close knit family who shared the good fortune of living near each other. Thus, it seems unlikely that the Collins brothers would not possess knowledge of the identities of their mother's brothers.

Apart from the inferences to be drawn from the brothers' living situation, there is documentary evidence which sheds powerful illumination on the issue of their knowledge of their familial relationship to Napier. In particular, in March 2005, Audia submitted a certification of attendance at the funeral of Lonnie Napier. That document reported that Lonnie Napier was Audia's "cousin." (R. Exh. 14, p. 12.) This fact assumes considerable significance when it is compared with the obituary for Jimmy Napier. That document reports that Jimmy Napier was "preceded in death by . . . two brothers: Darrell Napier and Lonnie Napier."[46] (GC Exh. 5.) I

[46] The same obituary for Jimmy Napier lists his siblings. It reports that he had only one sister, Patricia Osborne. This is additional evidence indicating that the Collins brothers would have been aware that their mother, Phyllis Collins, was not a sibling of Mr. Napier. The

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find it very difficult, if not impossible, to credit any claim that Audia knew that Lonnie Napier was his cousin but thought that Lonnie's brother, Jimmy, was his uncle.

The Collins brothers contend that they had always referred to Jimmy Napier as their "uncle." I do not find this to be convincing evidence that they had the mistaken belief that Napier actually was their uncle. It is entirely possible that, within the family circle, Napier was given an honorific title of "uncle." In itself, this does not prove that the brothers failed to realize that he was actually a cousin.

Far more important to resolution of this question is the state of the evidence regarding corroboration of this claim that Jimmy was always referred to within the family circle as the brothers' uncle. Although the record shows that various close relatives resided in the local area where this trial was held, counsel for the General Counsel failed to produce any family members to testify as to the familial relationship involving Napier or the descriptive term used by the Collins brothers to refer to that gentleman. As the Board has noted, "failure to call a potentially corroborative witness may be considered in determining whether the General Counsel has established a violation by a preponderance of the evidence." *Stabilus, Inc.,* 355 NLRB No. 161, slip op. at p.5, fn. 19 (2010).

Even more striking is the realization that the only familial evidence presented on these issues was provided by Robin Baker, the brothers' cousin. It will be recalled that Baker's parents are neighbors of the brothers and Baker's husband was described by Audia as his "best friend." (Tr. 239.) Ms. Baker reported that she sees the Collins brothers "a couple times a month." (Tr. 1097.) Baker, who appeared to me to be scrupulous in presenting accurate testimony despite the obvious discomfort this would cause to her and her family, provided this key information on the topic under discussion:

> COUNSEL FOR RESPONDENT: At any time, did you ever hear Jimmy Napier referred to as Uncle Jimmy by Roderic or Audia Collins?
>
> BAKER: No.[47]

(Tr. 1093-1094.)

Based on this evidentiary record, I readily conclude that the Collins brothers knew that Jimmy Napier was not their uncle. That record also clearly shows that the brothers understood the terms and conditions of the Employer's policy for granting paid and unpaid funeral leave. Indeed, both brothers had previously completed the paperwork to obtain paid leave for the funeral of their actual uncles. (See, R. Exh. 14, p. 8 and R. Exh. 6, p. 14.) Audia had also submitted a request for an unpaid leave of absence to attend the funeral of a cousin. (See, R. Exh. 14, p. 11.)

Employer recognized this as well, reporting to the state unemployment agency that, "Jimmy Napier's obituary . . . does not list Phyllis Collins as a sister or sister-in-law to Jimmy, which would be required in order for him to be Roderic's uncle." (GC Exh. 9, pp. 7-8.)

[47] Baker also reported that, on October 31, the family held a meeting to discuss the Employer's investigation of the brothers' funeral leave issue. At that meeting, Audia told the family that, "he knowed he done wrong." (Tr. 1095.) Interestingly, Roderic testified that the family did have such a meeting on October 31. See, Tr. 188-189.

In my view, the evidence establishes that the Collins brothers intentionally misstated their relationship to Napier by affirming on the Employer's forms that he was their uncle when they knew that this was not true. Even if one were to view the evidence as somewhat more equivocal, I note that the Employer's burden in this case does not require that it establish the brothers' guilt. As the Board has explained,

> In order to meet its burden under *Wright Line*, an employer need not prove that the disciplined employee had committed the misconduct alleged. Rather, it need only show that it had a reasonable belief that the employee had committed the alleged offense, and that it acted on that belief when it took the disciplinary action against the employee.

DTR Industries, 350 NLRB 1132, 1135 (2007), enf. 297 Fed Appx. 487 (6th Cir. 2008). [Citations omitted.] It is clear that this Employer had a reasonable belief that the brothers had falsified company documents in order to collect a monetary benefit that they were not entitled to receive.

Continuing with the analysis of the Collins brothers' defense of their conduct, I note that under their own reported version of the events, there is no dispute that they failed to come forward during the Employer's investigation despite having learned that Napier was not their uncle. Thus, Roderic testified that, after meeting with Griffin on April 13 about the issue, he went home and discussed the matter with his grandmother. As he put it, "that is when she informed me that I, indeed—that he—he—he was a cousin." (Tr. 78.) Roderic then discussed what he contended he had just learned with Audia. Audia confirmed this discussion, reporting that at this point, "we realized he was not our uncle." (Tr. 237.) He also testified that:

> [W]e decided to wait until Nelson [Griffin] was going to meet with us again . . . to let Nelson know that we had made a mistake and to—you know, so we can make it right.

(Tr. 239.)

Despite this purported plan of action, the credible evidence shows that at the time of their next meetings with company officials to discuss the matter, neither brother volunteered the information regarding Napier's true relationship to them. Streny testified that he began the telephone meeting with Audia by advising him that they believed that "funeral leave documentation might be falsified and that Jimmy Napier might not be your uncle." (Tr. 1264-1265.) Streny testified that Audia's reply was, "that Jimmy is his uncle." (Tr. 1265.) Thus, at a time when Audia has clearly stated that he knew better, he continued to maintain his fictitious story.

As to Roderic, the evidence is even more compelling. At his meeting with Griffin and Streny, Roderic was confronted with the Napier obituary. Only after being shown this telltale document did Roderic alter his account. As he described in his testimony, when Griffin showed him the obituary, "that's when I said—I went ahead and told him that I had spoke with my grandmother and there was a mistake made, and that I was wrong." (Tr. 85.)

Finally, in evaluating the credibility of the Collins brothers' position in this matter, one additional item must be addressed. While much of the testimony from the brothers centered on their allegedly mistaken belief that Napier was their uncle, it turns out that this was not really their actual belief. Thus, Roderic eventually testified that, at the time he submitted the funeral leave documentation, he thought that Jimmy Napier was, "the brother of my—Mae Willis, my

grandmother." (Tr. 165.) To underscore the point, he conceded that he "never thought" that Napier was a sibling of either of his parents. (Tr. 166.) [Counsel's words.] There is no contention that Audia took a different view of Napier's familial relationship or contended that Napier was something other than a great uncle. Even if the brothers had believed that Napier was their great uncle, they did not report this belief on their leave documentation. Had they done so, they would not have been eligible for paid funeral leave.

For all these reasons, I find that the Employer has proven that it formed a genuine and entirely reasonable belief that the Collins brothers had intentionally submitted a false claim for compensation that they were not eligible to receive under the funeral leave policy. Because this conclusion was eminently reasonable, it provides significant support to the legitimacy of the Employer's actions and motivations.

Two other factors are worthy of mention. The Board often observes that the failure of an employer to provide a consistent rationale for an adverse employment action is inferential proof of a discriminatory motivation. See, for example, *McClendon Electrical Services,* 340 NLRB 613, 614 (2003). Here, the Employer has never deviated from its assertion that the Collins brothers were terminated due to their falsification of the documents supporting their claim for paid funeral leave. This is an additional indicia of trustworthiness.

As a final matter, the General Counsel suggests that, "Respondent's insistence upon subjecting the Collins brothers to the harshest discipline is suspect."[48] (GC Br., at p. 45.) I disagree and am concerned that the General Counsel's attitude comes close to an impermissible infringement on the freedom of action of employers in our economic system. As the Board has counseled:

> An employer has the right to determine when discipline is warranted and in what form. It is well established that the Board cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline. The Board's role is only to evaluate whether the reasons the employer proffered for the discipline were the actual reasons or mere pretexts.

Castmatic Corp., 350 NLRB 1349, 1358-1359 (2007). [Internal punctuation and citations omitted.] See also, *Neptco, Inc.,* 346 NLRB 18, 20 (2005) (fact that discipline was "harsh" does not make it per se unlawful under the Act). In this case, the discipline imposed, while severe, was entirely consistent with the Employer's written policies and previous practices. On the record as a whole, I conclude that the discipline was motivated by a sincere response to the employees' misconduct and was not, in any significant degree, related to their union activities and sympathies. Having considered the entire body of credible evidence, I find that the General Counsel failed to meet his burden of demonstrating any motivational link between the employees' protected activity and the disciplinary actions taken against them. As a result, I will recommend that this allegation be dismissed.[49]

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[48] This parallels Roderic's testimony when he was asked if some discipline would have been appropriate as a response to his behavior. He replied, "I believe so. I—we were in the wrong, it was a mistake, but I feel like termination was very harsh." (Tr. 174.) While entirely understandable from his point-of-view, this statement comes close to conceding a vital point. If the Employer was justified in imposing discipline in response to these circumstances, that factor strengthens its claim that it acted from legitimate motives, not discriminatory animus.

[49] Because the General Counsel did not meet his burden of establishing a prima facie case

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4. The allegedly unlawful termination of Peggy Jackson

The final issue that must be resolved in this case concerns the discharge of Peggy Jackson on June 14.[50] Once again, the General Counsel contends that she was terminated from her employment because of the Company's unlawful animus against her arising from her union activities and sympathies. The Company asserts that Jackson was terminated through impartial application of two of its existing disciplinary policies. First, it cites the Plant Rules and Regulations which provide that an employee who commits the offense of "[w]illful insubordination or defiance of authority" may be subject to "automatic discharge regardless of the record of [that] employee." (GC Exh. 6, p. 40.) Second, it relies on the provisions of its progressive disciplinary policy which authorizes discharge of employees who "receive[ ] three (3) warnings in any twelve (12) month period." (GC Exh. 6, p. 41.) In the Employer's view, because Jackson refused to follow orders given her by two supervisors and violated Company health and safety rules, both disciplinary policies were properly applied to her situation. As with the Collins brothers, these conflicting claims require a "dual motive" analysis using the *Wright Line* methodology.

As was also true regarding the Collins brothers, the Employer concedes that the first three steps of that analysis are not at issue. (See, R. Br., at p. 34.) Jackson engaged in protected union activities and her Employer knew of her participation in those activities. She was obviously subjected to an adverse employment action. Once again, the ultimate issue turns on the nature of the Employer's motives. In assessing those motives, I will apply the same tools and standards described with reference to the Collins' terminations.

Turning to a brief recapitulation of the events of June 2, Jackson arrived at the facility without wearing her required uniform. Beyond this, she chose to dress in street clothing that was not compliant with the Employer's mandated Good Manufacturing Practices.[51] On entering

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of unlawful discrimination, there is no cause to address the final step of the *Wright Line* analysis. In the interest of decisional completeness, I will observe that had it been necessary to evaluate the Employer's defense at that step, I would have concluded that the Employer met its burden of demonstrating that the Collins brothers would have been discharged for falsification of records with the intent to obtain funds that they were not entitled to receive. This adverse action would have been imposed regardless of the Employer's attitude toward their protected activities or union sympathies. See, *Syracuse Scenery & Stage Lighting Co.,* supra at 674 (even if one were to assume that unlawful animus existed, discharge of employees who "falsified records to secure payment for hours they did not work—and lied about the matter" was found to be lawful, as it would have occurred regardless of such animus).

[50] Unlike the other alleged unfair labor practices, Jackson's discharge does not require assessment as allegedly objectionable conduct that could have affected the results of the election. Her termination did not occur until well after that event.

[51] This is an important point. The General Counsel cites to the evidence that clearly establishes that "many" employees had been permitted to wear street clothing for brief trips between the restroom and the employees' entrance/exit. (GC Br., at p. 50.) This is offered as proof of disparate treatment. Close analysis demonstrates that this is not a proper inference. As Streny and Griffin explained, management permitted employees to travel the very short distance between the entrance and the restroom in street clothes. However, this tolerance did not extend to street clothing that violated the Good Manufacturing Practices. Because Jackson was wearing impermissibly short and loose clothing and open toed, high heeled shoes with decorative stones attached, and also because she chose to travel past the restroom through a

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the production area of the plant, she elected to walk past the restroom in order to reach the time clock. This was a distance of more than 134 feet. During her travels, she was twice accosted by supervisors who, being struck by her highly unusual behavior, instructed her to return to the restroom to change into suitable attire. She chose to ignore both directives. Only after clocking in did she return to the restroom and change into her uniform.

In an example of probative circumstantial evidence, it is striking to note that each of the two supervisors, acting independently, was so troubled by Jackson's behavior that they made immediate oral and written disciplinary reports. From the moment management officials observed her conduct, through the course of other administrative proceedings, and during the trial of this case, the rationale offered for their response to Jackson's behavior has never waivered. It has been articulated clearly and consistently. Just as a series of shifting rationales suggests prevarication and pretext, the constancy and logical potency of the rationales offered in this case support their legitimacy and sincerity.

While I have been impressed with the rationale articulated, I have carefully considered the arguments offered to support a more sinister interpretation. As to direct evidence of unlawful animus, I have already discussed my finding that no such credible evidence existed through the date of termination of the Collins brothers. In the period of approximately 2 months between that event and Jackson's discharge, the only additional allegation of impropriety consisted of Wheeler's alleged statements to Gibson in a conversation asserted to have occurred sometime in May. I have previously noted my conclusion that much of Gibson's own account of this discussion demonstrated that Wheeler took care to avoid any transgression of the Act's boundaries. As with the Collins brothers' terminations, I find no credible direct evidence of unlawful animus, merely a background context of lawfully expressed opposition to the Union's organizing campaign.

As to circumstantial evidence, I have examined the factors raised by the General Counsel and the countervailing matters adduced by the Employer. Counsel for the General Counsel begin their analysis by asserting that unlawful motivation may be inferred from Jackson's discharge within 2 weeks of the representation election. Of course, the difficulty with this analysis is that Jackson's discharge also took place within 2 weeks of her misconduct that involved both violation of health and safety rules and repeated insubordination. As a result, the circumstances are at least as compelling as those addressed by the Board in *Frierson Building Supply Co.,* 328 NLRB 1023, 1024 (1999), where it was observed that:

> The record in this case shows nothing more than that the timing of [the employee's] discharge shortly after the representation election was a coincidence. Such a coincidence, at best, raises a suspicion. However, mere suspicion cannot substitute for proof of unlawful motivation.

[Internal punctuation, footnote, and citation omitted.] Given the severity of Jackson's misconduct, I cannot conclude that the timing gives rise to even such a suspicion. In my view, the more logical inference to be drawn from the sequence of events is that the Employer evaluated the events of June 2 involving Jackson and took disciplinary action motivated by genuine concern about the impact of her misconduct in the workplace.

In my view, the General Counsel's best argument that there is circumstantial evidence to

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production area to reach the time clock, her behavior fell well outside the limited tolerance of street clothing permitted by management.

support an inference of unlawful motive concerns the stated terms of the Employer's handbook regarding the imposition of progressive discipline. After listing certain offenses, including insubordination, which may result in immediate termination regardless of an employee's past record, the handbook provides that other offenses "will result in a verbal warning, a written warning, or suspension depending on the circumstances surrounding the offense." (GC Exh. 6, p. 41.) It goes on to state, "Any employee who receives three (3) warnings in any twelve (12) month period may be discharged." (GC Exh. 6, p. 41.) The General Counsel notes that the Employer did not apply this provision in the manner in which it is expressed in the handbook.

In order to grasp the General Counsel's point, it is necessary to outline Jackson's relevant past disciplinary history. This begins on November 18, 2009, when she was given formal counseling for, "Failure to follow Instructions," and "Defective and Improper Work."[52] (R. Exh. 24, p. 2.) Just over 2 months later, she received a written warning for another instance of "Defective and Improper Work." (GC Exh. 18.) Less than 11 months later, she was issued a 3-day suspension for the same type of deficient work performance. (GC Exh. 19.) It was less than 6 months after that discipline when the two supervisors cited her for the health, safety, and insubordination offenses that led to her discharge.

I agree with the General Counsel that Jackson's discharge under these circumstances does not conform to the letter of the Employer's progressive disciplinary policy. As Jackson, herself, asserted to her supervisors, she had not accumulated a record of three disciplinary offenses within 12 months of the events at issue. Despite this, I have concluded that a number of persuasive reasons support the Employer's position that this departure from the language of the handbook does not constitute probative evidence of unlawful motivation. In conducting my analysis of this issue, I have been mindful of the Board's sensible admonition that "perfect consistency" is not required in order to rebut a claim of pretext. *Consolidated Biscuit Co.,* 346 NLRB 1175, 1177, fn. 14 (2006), enf. 301 Fed Appx. 411 (6th Cir. 2008).

The Employer presented a variety of evidence in order to explain the seeming inconsistency in Jackson's treatment under the progressive discipline policy. In particular, Streny presented a credible explanation that was fully corroborated by reliable documentary evidence. He described the actual and intended operation of the progressive discipline system as follows:

> If you receive discipline at a point in time, and then if you were to go 12 months from the date of your last discipline, you would—if you did not receive any discipline in that time, the progressive discipline process would start over. If you received a second discipline within 12 months of the first one, it would be progressive and move to the next step. And then, if you received another discipline within 12 months of that second document, then it would escalate to the next level until you reach termination level.

(Tr. 1281.) Streny then outlined the fact that Jackson had been disciplined in January 2010. She was again disciplined in December 2010, less than a year later. Finally, her third disciplinary sanction was applied in June 2011, much less than a year after the second event.

[52] This counseling does not constitute the first link in Jackson's chain of infractions that led to her termination under the progressive discipline system. That chain begins with her subsequent written warning.

The Employer's personnel files demonstrate that Streny's description of the actual application of the progressive disciplinary system was accurate. For example, the Employer utilizes a form titled, "Performance Correction Notice," which describes the policy in the following language:

> If an employee can perform at a satisfactory level for the twelve months following the most recent Performance Correction Notice, s/he will restart the progressive discipline process. However, if an employee continues to receive Performance Correction Notices, s/he will continue to follow the next step(s) of the progressive discipline process.

(R. Exh. 38, p. 6.) [Underlining in the original.]

This description of the process mirrors the manner in which it was applied to Jackson. In addition, other documentary evidence demonstrates that it accurately reflects the way in which the process was routinely applied to other employees. This was best illustrated by a chart compiled by counsel for the Employer which lists disciplinary records for a number of different employees in the 2 years preceding Jackson's termination. Four of them were terminated by application of the policy as described by Streny despite the fact that a literal reading of the handbook would have led to a different outcome. (See, R. Br., at p. 7, based on personnel records found at R. Exh. 44.)

On balance, I concur in counsel for the Employer's contention that, while their client's policy, as described in its handbook, was inadequately expressed, "it is equally clear that the way it has been enforced is clear and has been applied consistently with respect to Jackson." (R. Br., p. 42, fn. 35.) Again, it must be stressed that the Board's role is not to judge the wisdom of an employer's policies and procedures or the competence with which they are expressed and enforced, but rather to assess whether they have been applied sincerely and in furtherance of legitimate ends or insincerely in order to disguise an unlawful motive. In this case, I conclude that Jackson's termination under the progressive discipline system was consistent with past practice and motivated by a genuine intent to make an appropriate response to her serious and repeated misconduct.

Although I have addressed the General Counsel's argument regarding progressive discipline in considerable detail, I must also observe that, ultimately, it would be unavailing even if persuasive. It must be recalled that the Employer has always explained Jackson's discharge by reference to both the progressive system and its other written disciplinary policy that provides for "automatic discharge regardless of the record of an employee" for offenses that include, "[w]illful insubordination or defiance of authority." (GC Exh. 6, p. 40.) The Employer clearly proved that Jackson twice defied direct orders to exit the production area of the plant and change into required clothing before returning to clock in. As the Board has held, "[e]mployees have a statutory right to engage in union activity without interference from their employer. But, the Act is not a shield protecting employees from their own misconduct or insubordination."[53]

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[53] The Board cited to *Guardian Ambulance Service,* 228 NLRB 1127, 1131 (1977), where it had adopted a judge's decision finding a discharge lawful because it was made in response to "defiance of a direct order by [a] superior . . . the type of conduct an employer cannot condone." I think it worthwhile to stress that the judge's language should not be read as suggesting that an employer is always privileged to discharge a union supporter for instances of insubordination. If the asserted act of insubordination is merely a pretext to rid an employer of a union adherent,

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Neptco, 346 NLRB 18, 19 (2005). [Internal punctuation and footnote omitted.]

As is common in cases of this type, the parties introduced a large quantity of disciplinary records that may be evaluated in order to assess whether the discharge reflected a consistent application of preexisting policies and practices. The General Counsel asserts that these records show an unduly harsh application of discipline in Jackson's case. I do not agree. It is abundantly clear that those records establish that the Employer responded to violations of its health and safety rules with disciplinary sanctions. Employees were formally sanctioned for eating and drinking in the production area, violating rules that mandate proper attire, and possessing unauthorized objects on the production line. (See, R. Exhs. 38, 42, and 44.) Because these infractions were addressed under the progressive disciplinary system, the precise punishment varied, depending on the employees' past history. Therefore, the fact that an employee may have received a mere warning or suspension for a violation comparable to Jackson's health and safety infraction does not show inconsistency or inordinate severity of punishment. Beyond this, it is again necessary to recall that Jackson chose to deliberately ignore repeated instructions designed to ameliorate the risks associated with her health and safety violation.[54] These acts of insubordination took her conduct outside the progressive disciplinary process and justified her termination under a different set of disciplinary rules.

In sum, the General Counsel has failed to cite any instance where an employee engaged in a comparable pattern of both progressive disciplinary infractions and repetitive insubordination and received a lesser sanction. When asked why he and Koplowitz decided to terminate Jackson, Streny testified that it had nothing to do with her union activities. His stated rationale was:

> She was guilty of insubordination, defying authority of not one but two supervisors. And also G[ood] M[anufacturing] P[ractices] compliant. She was out of compliance with wearing a skirt and open-toed shoes with rhinestones on them.

(Tr. 1279.) I find this rationale to be entirely accurate in describing Jackson's actual conduct on June 2. I credit Streny's stated assertion that her discharge was a legitimate response to that conduct and was not a product of animus against her union activities or sympathies. As a result, I will recommend that this allegation be dismissed.[55]

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termination would violate the Act. The judge's real point, which the Board was endorsing, was that insubordination is such a serious example of workplace misconduct that it lends considerable weight to an employer's claim that the discharge was a legitimate and sincere response to that misconduct. I find this to be true here.

[54] Counsel for the General Counsel argue that the Employer issued lesser sanctions for insubordinate conduct by Carrie Messer and Ruby Matthews. See, GC Br., at pp. 31-32. I do not find this persuasive because Messer and Matthews engaged in negligent failures to follow instructions. Jackson chose to make a direct and willful defiance of orders. This qualitative difference in the degree of misconduct explains the resulting difference in the severity of management's response.

[55] As with the Collins brothers' terminations, I have found that the General Counsel failed to meet his initial burden under the *Wright Line* analysis. However, assuming that it had been necessary to examine the Employer's evidence at the final step of that analysis, I would have concluded that the Employer had met its burden of showing that Jackson's misconduct was of a type and severity that would have resulted in her discharge regardless of the existence of any unlawful animus against her arising out of her union activities and sympathies.

Conclusions of Law

1. The General Counsel has failed to meet his burden of proving that the Employer committed any of the unfair labor practices alleged in the amended consolidated complaint.

2. The Petitioner has failed to meet its burden of proving that the Employer engaged in any election misconduct as alleged in its objections to the election. [56]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended order and certification of election:

ORDER[57]

The amended consolidated complaint is dismissed.

CERTIFICATION OF ELECTION[58]

The objections to conduct by the Employer are overruled.

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 280, AFL-CIO-CLC, and that it is not the exclusive representative of these bargaining unit employees.

Dated, Washington, D.C. March 1, 2012

_____
Paul Buxbaum
Administrative Law Judge

[56] By the same token, there was insufficient proof of other allegedly objectionable conduct that had been raised by the Regional Director in his report.

[57] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[58] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, Exceptions to this Report on Election may be filed with the Board in Washington, D.C., within 14 days from the date of issuance of this Report and Recommendations. Exceptions must be received by the Board in Washington by March 15, 2012.